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Docket Entries

UNITED STATES DISTRICT COURT

(A)

64 Cr. 897

THE UNITED STATES

VS.

ANDIMO PAPPADIO

T.18 S.1406, US Code.

Contempt.

DATE

PROCEEDINGS

- 10-15-64 Filed affdvt & show cause order, why deft. not be held in contempt of Court. Ret. 10-28-64.
Herlands, J.
- 10-27-64 Filed Affidavit of Andimo Pappadio, dated 10/27/64, entitled "Answer To Order To Show Cause And Affidavit".
- 10-29-64 Filed deft's "Memorandum in opposition to Rule to Show Cause why Andimo Pappadio should not be adjudged in contempt of Court.
- 10-29-64 Hearing held on motion re: Contempt and concluded—Decision Reserved—Herlands, J.
- 10-30-64 Decision—Court reads findings & conclusions into the record: The Court finds the respondent Guilty of Criminal Contempt and respondent is sentenced to TWO (2) years. Application to

Docket Entries

fix bail pending appeal denied. Respondent paroled in custody of his attys pending application to U.S.C.A. to fix bail pending appeal.

Herlands, J.

- 10-30-64 One envelope containing following exhibits: Govt's Exh. 1 through 12 inclusive and respondent's Exh. A. ordered to remain in custody of the Clerk of the Court and to be retained in the case file. Herlands, J.

- 10-30-64 Deft. surrendered to U.S. Marshal to begin service of sentence. (Application before U.S.C.A. for bail pending appeal denied.)

- 10-30-64 Filed Judgment—TWO (2) years at a place of confinement to be designated by the Atty. Gen'l. or until further order of this Court, should ANDIMO PAPPADIO answer before the Grand Jury the questions which appear on the record as he was ordered to answer and should defendant answer those questions before the expiration of said sentence or the discharge of said Grand Jury whichever may first occur, the further order of this Court may be made terminating or modifying the sentence of imprisonment. Deft's oral motion for bail pending appeal is denied. Herlands, J.

- 10-30-64 Issued commitment and copies.

- 10-30-64 Filed notice of appeal (Copy mailed to Warden, FDH, 11-2-64).

**Order to Show Cause to Adjudge Defendant in
Contempt of Court**

(78)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Re

ANDIMO PAPPADIO

Upon the annexed affidavit of Andrew M. Lawler, Jr., Assistant U. S. Attorney, verified the 14th day of October, 1964, it is

ORDERED, that Andimo Pappadio show cause at a term of this Court to be held on the 28th day of October, 1964, at 10:00 o'clock in the forenoon of that day, in Room 318 U.S. Court House, Foley Square, New York, N. Y., or as soon thereafter as this matter may be heard, why he should not be adjudged and held in contempt of this Court.

Service of this order on the respondent or his counsel at any time prior to 4:00 P.M. on the 15th day of October, 1964, by placing the same in the mails shall be deemed sufficient.

Dated: New York, New York
October 14, 1964.

WILLIAM B. HERLANDS
U.S.D.J.

**Affidavit of Andrew M. Lawler, Jr. Read in
Support of Motion**

(79)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In Re

ANDIMO PAPPADIO

STATE OF NEW YORK	} ss.:
COUNTY OF NEW YORK	
SOUTHERN DISTRICT OF NEW YORK	

ANDREW M. LAWLER, JR., being duly sworn, deposes and says:

1. I am an Assistant U. S. Attorney in the office of Robert M. Morgenthau, United States Attorney for the Southern District of New York, assigned to the above-captioned matter, and am familiar with the facts thereof.

2. This affidavit is made in support of an application for an Order to Show Cause why Andimo Pappadio should not be held in contempt of this Court, and is made upon personal knowledge.

3. Andimo Pappadio did appear on the 14th day of February, 1964, on the 24th day of April, 1964 and on the 8th day of May, 1964 before a duly constituted grand jury of the Southern District of New York.

Affidavit of Andrew M. Lawler, Jr.

4. The grand jury was then and there inquiring into alleged violations of the laws relating to narcotics as set forth in Title 18, United States Code, Section 1406.

(80)

5. Andimo Pappadio refused to answer certain questions relating to matters under inquiry before said grand jury.

6. On August 4, 1964, upon oral and written application of the United States Attorney, Andimo Pappadio was directed by an order of the Honorable Lloyd F. MacMahon, United States District Judge, pursuant to Title 18, United States Code, Section 1406, to return to the grand jury and answer certain questions.

7. On August 4, 1964, Andimo Pappadio appeared before the said grand jury but then and there refused to answer the questions as directed.

8. On October 8th, 1964 the immunity provisions of Title 18 United States Code, Section 1406 were again explained to Andimo Pappadio in the presence of his attorney, by the Honorable William B. Herlands. Judge Herlands then directed Andimo Pappadio to return to the grand jury and testify pursuant to the immunity granted him under Section 1406.

9. On October 13, 1964 Andimo Pappadio appeared before the grand jury and refused to answer certain questions. That same morning Andimo Pappadio represented by counsel, was brought before the Honorable William B. Herlands who then and there directed the witness to answer the specific questions which he had refused to answer. (81) Thereafter that same day Andimo Pappadio again appeared

Affidavit of Andrew M. Lawler, Jr.

before the grand jury and wilfully refused to answer the questions as directed.

WHEREFORE, your deponent respectfully requests that the respondent be ordered to show cause why he should not be held in contempt of this Court.

ANDREW M. LAWLER, JR.
Assistant U. S. Attorney

Sworn to before me this
14th day of October, 1964.

**Answer to Order to Show Cause and Affidavit of
Andimo Pappadio in Opposition to Motion**

(83)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In re

ANDIMO PAPPADIO

ANDIMO PAPPADIO, being duly sworn, makes the following answer to the affidavit of Andrew M. Lawler, Jr., attached to the order to show cause why he should not be held in contempt of this Court.

1-4. Admits paragraph 1-4 thereof.

5. Admits paragraph 5 thereof, but avers that defendant refused to answer on the grounds of privilege.

6. It is averred that on such date, to wit, August 4, 1964, the Assistant United States Attorney applied to the Court to extend immunity to the defendant pursuant to 18 U.S.C. § 1406. On the said date, the Court, by McMahon, Jr., granted immunity pursuant to the statute aforementioned and directed the defendant to answer the questions read into the record at the said hearing on August 4, 1964, but this was not done in the presence of his attorney.

7. Admitted, but it is averred that defendant asserted his constitutional privilege.

8. Admitted, but it is further averred that on October 9, 1964, which the affidavit of the United States Attorney omits

*Answer to Order to Show Cause and Affidavit of
Andimo Pappadio in Opposition to Motion*

to relate, the defendant returned to the Grand Jury and answered whatever questions were put to him that he (84) had been specifically directed by the Court to answer, but not all of the questions which he had been directed to answer by the Court were put to him. It is further averred that different questions were asked the defendant which he refused to answer on the ground of privilege and which he had not been specifically directed by the court to answer.

9. It is admitted that on October 13, 1964, the defendant appeared before the Grand Jury and refused to answer certain questions. It is averred, however, that the defendant refused to answer the said questions on the grounds of the First, Fifth and Sixth Amendments of the United States Constitution. The defendant further avers that the reasons he refused to answer these questions were that there is pending against him an indictment charging him with violation of the Federal Narcotics Law. A copy of the said indictment is attached hereto and marked Exhibit "A". In addition, the Assistant District Attorney has informed him that "It's been alleged" that he is a member of a particular group involved in a number of illegal activities. The defendant further avers that the Assistant District Attorney stated to him before the Grand Jury "that there was testimony that you attended a meeting" where the distribution of narcotics was discussed. The defendant attaches hereto Exhibit "B" the actual testimony in which a Government witness, Cantellopps, testified concerning him. See also *U. S. v. Aviles*, 274 F. 2d, 179, 185 (2 Cir. 1960).

Defendant states that he has been and is in consultation with attorneys, not only with respect to the instant Grand

*Answer to Order to Show Cause and Affidavit of
Andimo Pappadio in Opposition to Motion*

Jury proceeding, but also with respect to the indictment pending against him and with respect to a possible proceeding for perjury against him even though he has truthfully answered the questions put to him by the Assistant (85) District Attorney before this Grand Jury. In connection therewith, defendant has been and is engaged in preparation for his defense, not only for the indictment outstanding against him, but for the possible proceedings for perjury against him.

To answer the questions put to him before the Grand Jury would result in the disclosure to the Government of matters of defense, as well as matters within his privilege of confidence between client and attorney. To answer such questions would result in interference with and impairment of his right to defend himself and the effective assistance of counsel.

Defendant is aware and believes that Federal and local officials are engaged in surveillance activities including mail watches and other methods of eavesdropping. Defendant fears that to answer these questions put to him will result in additional surveillance and eavesdropping with respect to his attorneys and witnesses. Defendant fears that to answer these questions put to him will substantially impair and prejudice his ability to defend himself at the trial for which he is indicted or at a trial if he is indicted for perjury.

Defendant further avers that the questions put to him are designed to destroy his fundamental rights to privacy and effective assistance of counsel and that they are not relevant or material to the inquiry for which immunity was granted to the defendant.

*Answer to Order to Show Cause and Affidavit of
Andimo Pappadio in Opposition to Motion*

WHEREFORE, defendant prays that the order to show cause why he should not be adjudged in contempt of this Court be dismissed.

ANDIMO PAPPADIO

(86)

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

ANDIMO PAPPADIO, being duly sworn, deposes and says that he is the defendant herein. That he has read the order to show cause issued by this court on October 14, 1964 and the affidavit of Andrew M. Lawler, Jr., attached thereto.

That he has read the foregoing answer to order to show cause and that the facts therein stated are true and correct to the best of his knowledge, information and belief.

ANDIMO PAPPADIO

Sworn to before me this
day of October, 1964.

**Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio**

[INDICTMENT]

(87)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. Cr 156-157

UNITED STATES OF AMERICA

vs.

ALFREDO AVILES, CHARLES BARCELLONA, JOSEPH BETANCOURT, JEAN CAPECE, LUIS CANTRES, ROSARIO COLLETTI, ANTHONY COLONNA, PETER CONTES, JOAQUIN CORBO-CORDOVA, SANTIAGO DE FILLO, CHARLES DI PALERMO, JOSEPH DI PALERMO, MARY DOE, also known as ROSE, meaning thereby to describe a white female of Italian extraction, approximately 28 years old, 5'4" tall, and weighing about 130 lbs., JOHN DOE, also known as JAMES LAURENSANO, meaning thereby to describe a white male, with greying black hair, weighing approximately 155 pounds and about 5'8" tall, wearing eyeglasses, NATALE EVOLA, LOUIS FIANO, CARMINE GALANTE, VINCENT GIGANTE, VITO GENOVESE, JOHN GONZALEZ, NELSON HERMIDIA, ALEXANDER LENKO, GLORIA LEON, DANIEL LESSA, NICHOLAS LESSA, BENJAMIN LEVINE, ROCCO MAZZIE, SALVATORE MARINO, JOHN ORMENTO, ANDIMO PAPPADIO, CARMINE A. POLIZZANO, RALPH POLIZZANO, BENJAMIN RODRIQUEZ, WILLIAM ROVIRA, JOHN RUSSO, SALVATORE SANTORA and JOSEPH VENTO,

Defendants.

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

The Grand Jury charges:

1. On or about the first day of February, 1955 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, ALFREDO AVILES, CHARLES BARCELLONA, JOSEPH BETANCOURT, JEAN CAPECE, LUIS CANTRES, ROSARIO COLLETTI, ANTHONY COLONNA, PETER CONTES, JOAQUIN CORBO-CORDOVA, SANTIAGO DE FILLO, CHARLES DI PALERMO, JOSEPH DI PALERMO, MARY DOE, also known as Rose, meaning thereby to describe a white female of Italian extraction, approximately 28 years old, 5'4" tall, and weighing about 130 lbs., JOHN DOE, also known as JAMES LAURENSANO, meaning thereby to describe a white male with greying black hair, weighing approximately 155 pounds and about 5'8" tall, wearing eyeglasses, NATALE EVOLA, LOUIS FIANO, CARMINE GALANTE, VITO GENOVESE, VINCENT GIGANTE, JOHN GONZALEZ, (88) NELSON HERMIDIA, ALEXANDER LENKO, GLORIA LEON, DANIEL LESSA, NICHOLAS LESSA, BENJAMIN LEVINE, ROCCO MAZZIE, SALVATORE MARINO, JOHN ORMENTO, ANDIMO PAPPADIO, CARMINE A. POLIZZANO, RALPH POLIZZANO, BENJAMIN RODRIQUEZ, WILLIAM ROVIRA, JOHN RUSSO, SALVATORE SANTORA and JOSEPH VENTO, named as defendants herein, and Mario Aiello, Sandalia Curbello, Luis Diaz, Jesus Guzman-Acevedo, Victoria Guzman-Silva, Feliciano Pagan, Luis Rosa-Garcia, Gloria Sanchez, Nelson Silva, Robert Roe, also known as "Mexican", meaning thereby a white male of Spanish extraction, approximately 30 years of age, 5'10" tall, 160 pounds, black wavy hair, medium build, olive complexion with mustache; Richard Roe, also known as "Cuba", meaning thereby to describe a male of Cuban extraction, approximately 26 years old, 5'6" tall, 130

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

pounds, dark wavy hair, light brown complexion; William Doe, meaning thereby to describe a male of Cuban extraction, approximately 45 years of age, approximately 5'7" tall, dark complexion, greying hair, dark brown eyes, lean build; William Roe meaning thereby to describe a white male of Hebrew extraction, approximately 44 years of age, approximately 5'4" tall, about 155 pounds, greying brown hair, fair complexion, stocky build; and Mary Roe, meaning thereby to describe a white female, approximately 30 years of age, 5'5" tall, 125 pounds, reddish brown hair, green eyes, named as co-conspirators but not as defendants herein, and divers other persons to the Grand Jury unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 173 and 174 of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would receive, conceal, possess, buy, sell and facilitate the transportation, concealment and sale of a quantity of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, after the said narcotic drugs had been imported and brought into the United States contrary to law, knowing that the said narcotic drugs had been imported and brought into the United States contrary to law in violation of Sections 173 and 174 of Title 21, United States Code.

(89)

(3) It was a part of said conspiracy that said defendants and co-conspirators would unlawfully import, smuggle, and clandestinely introduce large amounts of narcotic

*Exhibit A Annexed to Foregoing Affidavit of
Andino Pappadio*

drugs into the United States from and through Cuba, Puerto Rico, Mexico, and other countries to the Grand Jury unknown.

4. It was further a part of said conspiracy that said defendants and co-conspirators would dilute, mix, and adulterate said illegally imported narcotic drugs prior to their distribution throughout the United States.

5. It was further a part of said conspiracy that said defendants and co-conspirators would unlawfully distribute quantities of narcotic drugs, the amounts of which are to the Grand Jury unknown, throughout the United States, to wit: New York City, New York; Chicago, Illinois; Las Vegas, Nevada; Philadelphia, Pennsylvania; Cleveland, Ohio; and other cities and states of the United States to the Grand Jury unknown.

6. It was further a part of said conspiracy that the defendants and co-conspirators would misrepresent, conceal, hide and cause to be misrepresented, concealed and hidden, the purpose of the acts done in furtherance of the conspiracy.

(90)

OVERT ACTS

1. In pursuance of the said conspiracy and to effect the objects thereof, in or about March of 1955, in the Southern District of New York, the defendants CHARLES BARCELLONA, ANTHONY COLONNA, JOSEPH DI PALERMO, and CARMINE A. POLIZZANO had a conversation in Al's Restaurant, East 4th Street, New York, New York.

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

2. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about March of 1955, the defendants LUIS FIANO and CARMINE A. POLIZZANO had a meeting in Las Vegas, Nevada.

3. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about May or June of 1955, in the Southern District of New York, the defendants JOSEPH DI PALERMO, CARMINE A. POLIZZANO and RALPH POLIZZANO had a conversation at Al's Restaurant, East 4th Street, New York, New York.

4. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August of 1955, in the Southern District of New York, the defendants CARMINE A. POLIZZANO and JOSEPH DI PALERMO had a conversation at the 21 Place Bar, 21 Second Avenue, New York, New York.

5. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August of 1955, the defendant CARMINE A. POLIZZANO traveled from New York City to Chicago, Illinois, where he met co-conspirator William Roe.

6. Further in pursuance of the said conspiracy and to effect the objects thereof, in August and September, 1955 in the Southern District of New York, the defendant DANIEL LESSA received narcotics from co-conspirator Nelson Silva in the vicinity of the Progresso Bar, Bronx, New York.

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

7. Further in pursuance of the said conspiracy and to effect the objects thereof, in August and September, 1955 in the Southern District of New York, the defendant BENJAMIN RODRIQUEZ received narcotics in the vicinity of the Progresso Bar, Bronx, New York.

(91)

8. Further in pursuance of the said conspiracy and to effect the objects thereof, in August and September, 1955 in the Southern District of New York, the defendant WILLIAM ROVIRA received narcotics at the Gallo-D'Oro Bar, Madison Avenue, New York, New York.

9. Further in pursuance of the said conspiracy and to effect the objects thereof, in October 1955, the defendants CHARLES DI PALERMO, JOSEPH VENTO and co-conspirator Richard Roe, had a meeting in Miami, Florida.

10. Further in pursuance of the said conspiracy and to effect the objects thereof, in November 1955, in the Southern District of New York, the defendant BENJAMIN LEVINE proceeded to an apartment at East 4th Street, New York City, New York.

11. Further in pursuance of the said conspiracy and to effect the objects thereof, in February 1956, in the Southern District of New York, deliveries of narcotics were made from the defendant ROSARIO COLLETTI to the defendant JOHN GONZALEZ at 793 Ninth Avenue, New York City, New York.

12. Further in pursuance of the said conspiracy and to effect the objects thereof, in June 1956, in the Southern

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

District of New York, the defendants CHARLES DI PALERMO, JOHN RUSSO, and RALPH POLIZZANO diluted narcotics in a restaurant operated by defendant ALEXANDER LENKO in New York City, New York.

13. Further in pursuance of the said conspiracy and to effect the objects thereof, in June 1956, defendant CHARLES DI PALERMO delivered a package to co-conspirator Mary Roe, in Cleveland, Ohio.

14. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about the month of July 1956, in the Southern District of New York, the defendants JOHN ORMENTO, ROCCO MAZZIE, NATALE EVOLA and VITO GENOVESE went to a bar at 96th Street, in New York City, New York.

15. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about the month of July 1956, in the Southern District of New York, the defendants JOHN ORMENTO, ROCCO MAZZIE, NATALE EVOLA, SALVATORE SANTORA and co-conspirator Robert Roe had a conversation in a hotel on 85th Street, New York City, New York.

(92)

16. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, in the Southern District of New York, the defendants JOHN ORMENTO, ROCCO MAZZIE, and SALVATORE SANTORA had a meeting in the vicinity of 80th Street and Columbus Avenue, New York City, New York.

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

17. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, the defendant ROCCO MAZZIE traveled from New York City to Philadelphia.

18. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, in the Southern District of New York, the defendants VINCENT GIGANTE, JOHN ORMENTO, and VITO GENOVESE, drove on the West Side Highway, New York City, New York.

19. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, in the Southern District of New York, the defendants JOHN ORMENTO, ROCCO MAZZIE, and ANDIMO PAPPADIO, SALVATORE SANTORA, VITO GENOVESE, and CARMINE GALENTE had a conversation in a house on Seymour Avenue in the Borough of Bronx, City of New York.

20. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, in the Southern District of New York, defendant NICHOLAS LESSA received narcotics in the vicinity of 119th Street and Third Avenue in the Borough of Manhattan, City of New York.

21. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, in the Southern District of New York, the defendant PETER CONTES received narcotics in the vicinity of Pleasant Avenue and 116th Street in the Borough of Manhattan, City of New York.

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

22. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about August 1956, in the Southern District of New York, the defendant SANTIAGO DE FILLO was in the vicinity of 53rd Street and 8th Avenue, New York City, New York.

23. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about September 1956, in the Southern District of New York, the defendants JOSEPH DI PALERMO, JOAQUIN CORBO-CORDOVA, and co-conspirator Richard Roe had a conversation (93) in the vicinity of 44th Street and 8th Avenue, New York City, New York.

24. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about October 1956, in the Southern District of New York, the defendants JOSEPH BETANCOURT, NELSON HERMIDIA, and GLORIA LEON had a meeting in an apartment at Columbus Avenue in New York City, New York.

25. Further in pursuance of said conspiracy and to effect the objects thereof, in or about October 1956, in the Southern District of New York, the defendant MARY DOE delivered narcotics in the vicinity of 117th Street and Third Avenue, New York City, New York.

26. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about March 1957, in the Southern District of New York, the defendants RALPH POLIZZANO, ALFRED AVILES and SALVATORE MARINO had a conversation in the vicinity of 205 Eldridge Street, New York City, New York.

*Exhibit A Annexed to Foregoing Affidavit of
Andimo Pappadio*

27. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about March 1957, in the Southern District of New York, the defendant RALPH POLIZANO paid a sum of money to the defendant JEAN CAPECE in a bar on East 4th Street, New York City, New York.

28. Further in pursuance of the said conspiracy and to effect the objects thereof, in or about May 1957, in the Southern District of New York, the defendant LUIS CANTRES delivered narcotics in the Gallo D'Oro Bar, Madison Avenue, New York City, New York.

(Title 21, United States Code, Sections 173 and 174).

PAUL W. WILLIAMS
United States Attorney

ABBOT COPELAND
Foreman

**Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio**

(94)

342a

Nelson Silva Cantellops—for Government—Direct

Mr. Christy: Your Honor—

The Court: Objection overruled.

A. Chin and Vito Genovese.

Q. Was anybody else in the car? (1302) A. No; Ormento and myself.

Q. Now you were on the West Side Highway? A. Yes.

Q. Now where did you go, do you recall? A. I don't recall the place, I don't know the name of it.

Q. Did you go some place? A. We went to some house, to a house.

Q. Mr. Cantellops, I show you Government's Exhibit 34 for identification and I ask you if that is an accurate likeness of some place that you have been before? A. Yes.

Q. What is that place? A. That is the house where we went, to that place.

Q. Is that a reproduction or an accurate likeness of the place that you drove to that night? A. That is the house, like that. That's where we went. That's exactly a reproduction of the house we went that night.

Q. What happened when you got to the house? A. The occupants of the first car all went in (1303) and Ormento and I from the second car went in except Mr. Vito and Chin.

Q. You and Ormento went into the house, is that right? A. Yes.

Q. Was there anybody in the house? A. Was Rocco Mazzie and other people there.

Q. Did you know any of the other people there? A. No, I don't know them.

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

Q. Now what happened?

Mr. M. Stim: May we have the time of the day,
your Honor.

(95)

343a

Nelson Silva Cantellops—for Government—Direct

Q. Do you recall approximately the time of the day? A.
It was at night. It was already about 11 o'clock at night.
It was late at night.

Mr. M. Stim: 11 o'clock at night.

The Court: That is what he said.

Q. Who else went into the house if you can recall? A.
Ormento, Pappadio, Evola and Galante and myself.

Q. And Rocco Mazzie was in the house; is that correct?
A. Yes.

(1304) Q. What happened when you got into the house?
A. There was a blanket on the floor and a pair of dice.

Q. What happened? A. It look like a crap game but
that was to simulate a crap game, and everybody sat
around on chairs.

Mr. Chapman: I move to strike out what it was
to simulate.

The Court: Did he say simulate?

Mr. Chapman: He said that it was to simulate a
crap game.

Mr. Christy: That was his observation, your
Honor.

The Court: Tell us what the facts were. Describe
what there was.

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

The Witness: Well, there was no crap game but there was crap there, a pair of dice there.

Q. Was there some conversation? A. Yes.

Q. And would you tell us as best you can recall what was said in this conversation and by whom? A. The conversation was started by Ormento, and it was about sealing of the territory in the Bronx.

(96)

344a

Nelson Silva Cantellops—for Government—Direct

(1305) Mr. Edelbaum: Now, your Honor, that is a conclusion. I think we are entitled to have what the witness says that the man said, and I move to strike out the answer.

Mr. Christy: Your Honor, I think that it was responsive. He is saying what Ormento said.

The Court: The motion is granted.

Mr. Witness, try to use the exact language to the extent that you can recall and give us the person that you say used the language.

Q. Will you tell us as best you can recall what Ormento said? A. He was saying about sealing this territory and using it for the narcotics business.

Q. Was there a discussion about how the territory was going to be sealed?

Mr. M. Stim: I object to leading questions of this character. It is quite obvious—

The Court: Objection overruled.

*Exhibit B Annexed to Foregoing Affidavit of
Andino Pappadio*

A. The conversation went about the territory to be taken over, was the Spanish market, a big Spanish market in the Bronx, the Longwood area.

Q. In what area? A. The Longwood area and Fox Street, around that (1306) area. The main purpose was to get rid of the pushers at that time in that area.

Mr. Edelbaum: Your Honor, I object to that and move to strike it out.

The Court: Motion granted.

Tell us what was said.

The Witness: That is what was said. I am saying what was said.

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Nelson Silva Cantellops—for Government—Direct

Q. Will you continue and just tell us as best you can recall? A. It was said all the pushers in that area have to be taken out, plus a few banks and numbers have to be taken in because was to be sealed as they used to do; in other words, they buy a small policy number and push out—

Mr. M. Stim: I move to strike, your Honor, his observation or his explanation of "in other words." This is not conversation.

Q. Is that what was said? A. It was what was said.

(1307) Q. Will you continue. The area is comprised of most Spanish people. The bank numbers was no problem but the problem was too much narcotics pushers.

Mr. Edelbaum: I object to "the bank numbers was no problem." Is he saying that somebody said this,

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

and if he is, who said it? We are entitled to know that. Is he relating a conversation or is he giving us a conclusion?

The Court: The object is to get a conversation, Mr. Witness. Give us the conversation as far as you can.

The Witness: I said that. I am giving the conversation, what was said.

Q. Who said this? A. Ormento said it.

Q. Now will you continue.

The Court: What did Ormento say?

The Witness: He say that as far as numbers is concerned it was not too much a problem, but there was a big problem because there were too many pushers.

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Nelson Silva Cantellops—for Government—Direct

Q. And what else was said as best you can recall? A. The discussion took—turn to how long it (1308) will take to clear the area and whose method should be used.

Q. Who said what about this, if you can recall? A. It was said by Ormento, and everybody took part in the argument.

Mr. M. Stim: May we have who the “everybody” is, please?

Mr. Christy: Your Honor, I believe he has testified as to who the persons were who were present at this meeting.

The Court: Next question.

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

Q. Did everybody there participate in the conversation?
A. Everybody there.

Q. Now will you tell us what was said about the length of time? A. After about half an hour—not half an hour, I would say about 15 minutes or five minutes, they agree. They agree and disagree on the time—

Mr. M. Stim: I object to “agree” as a conclusion. Let him give us the conversation.

The Court: If you will give the witness an opportunity to you will get the conversation.

Will you please continue with your recital (1309) of what you heard said and by whom.

The Witness: After discussion of the pros and cons of the situation, they decided that the time to seal the place that was needed was at least a month and a half.

The Court: Who decided that and who said anything that make you feel that that was a decision

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or from which you draw that conclusion, because to the extent that it is a conclusion it is to be stricken. If anybody said that, that is what we want to get.

The Witness: Evola and Pappadio agree—they agree on that time, and then everybody went along with him.

* * * * *

(1310) The Court: * * *

Mr. Witness, you used the word “decide.” Did anybody say, “I decide this”?

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Puppadio*

The Witness: Well, they propose and that was accepted—

Mr. Edelbaum: I move to strike that out.

The Court: Motion granted.

(1311) Tell us who said what?

The Witness: Evola and Pappadio mentioned that will take a month. Everybody accept that decision, a month and a half, a month—or a month and a half.

By Mr. Christy:

Q. A month and a half or a month to do what? A. To clear the territory.

Q. What was said about clearing the territory and by whom? A. They first gave the matter of the time; they settled the time by getting an accord that it will take a month or a month and a half.

Mr. Edelbaum: I move to strike out that they settled and reached an accord. That is a conclusion, your Honor.

The Court: Motion granted.

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Q. After this, what was said about sealing the territory, the purpose of sealing the territory; what was said and by whom?

Mr. Edelbaum: I object to that, if your Honor please, as leading.

The Court: Objection overruled.

*Exhibit B Annexed to Foregoing Affidavit of
Andimo Pappadio*

A. The main purpose of the meeting was to take over this territory and bring new people in to distribute (1312) the narcotics business.

Mr. Edelbarm: I move to strike it out.

The Court: Motion granted.

Q. Did anybody say that?

The Court: Ladies and gentlemen, I do not have to repeat this everytime a motion is granted to strike any evidence or any testimony. What is stricken is to be completely disregarded by you as if it was never uttered and as if you never heard it. That is the purpose of striking it.

Q. What was said about the purpose and by whom? A. The purpose was to sell narcotics and the number banks to protect the narcotics business.

Q. Who said that?

Mr. Edelbaum: Just a moment.

A. I can't explain all the words—

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(1313) Q. Who at this meeting said anything about the purpose, if you recall? A. John Ormento, Evola and Pappadio.

Q. Will you tell us what they said about the purpose as best you can recall? A. Well, the conversation went in this way: What are we going to do about this place? It

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Andimo Pappadio*

went further, the conversation, to the point where time came to be an important factor. Time was set, one month or a month and a half to clear the place. Then they reach another point of the matter, the method to be used to clear this place, the obstructions, and different manual details that have to be taken care of.

The Court: Who mentioned the method and who mentioned the time?

The Witness: It was mentioned among all.

The Court: What?

The Witness: It was mentioned among all; everybody took part in the conversation.

Mr. Edelbaum: I move to strike his whole answer, the answer that preceded the last one to your Honor's question.

(1314) Mr. Christy: Your Honor—

The Court: Objection overruled. You may proceed, Mr. Christy.

Q. What was said about the purpose, what was to be done? A. The purpose was to take over that market over there.

Mr. Edelbaum: I move to strike it out, your Honor.

The Court: Objection overruled.

Did anybody say that at that meeting?

The Witness: Yes.

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The Court: Who said it?

The Witness: Ormento.

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Q. And after the market was taken over what was to be done? A. Then operate the organization of the territory.

Q. Who said that? A. Ormento.

Q. What were they going to operate? A. They will operate both businesses, numbers and narcotics.

Q. And who said that? A. Ormento.

(1315) Mr. Edelbaum: Now, your Honor, I call for the withdrawal of a juror and the declaration of a mistrial on the ground that the witness has testified to some other charges not contained in this indictment.

The Court: Motion denied.

Mr. Edelbaum: Exception.

Q. How long did this conversation take or how much time was consumed in this conversation? A. From 20 to 30 minutes.

Q. And what happened then? A. At the end of the conversation, at the end of the meeting, Genovese came in.

Q. What happened when he came in? A. He ask what was the decision, what was the decision in the plan, what they had in mind. Everybody spoke his part and the time and details, and he say that he wanted to know because he wanted to know when to send his men in.

Q. Who said that? A. Mr. Genovese.

Q. Was there anything else said while he was there? A. No. Only Pappadio said that he had a cousin that could do a good job because he was good at that.

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The Court: What was that, a cousin?

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(1316) The Witness: A cousin.

Q. Was anything else said that you can recall? A. As far as I recall, I don't recall.

Q. Was there any discussion about what part you were to play? A. That was discussed too but that was discussed after the meeting while we were driving off.

Q. And what was said about that?

Mr. M. Stim: May we have a time on that?

The Court: And by whom.

Q. Did you leave this home? A. Yes.

Q. And what happened when you left? A. We drove back to New York.

Q. Who is "we"? A. Evola, Ormento, Pappadio, Galente and myself.

Q. And what about Genovese and Gigante? A. They went away in their own car.

Q. On the way back was there a conversation? A. Yes, sir.

Q. And what was said and by whom? A. Ormento told me that after things were more clear, more clean in the place, I will be planted there as a contact man.

(1317) Q. For what? A. For the narcotic traffic.

Q. Was anything else said about your role? A. That is what I was supposed to be, the distributor; in other words, the contact man and distributor of the setup.

Q. Before you were to do this were you to do anything else? Was anything said about what you were to do? A. No. In other words, I was to do before I could take over, before I go, was to go around and check every pusher, every

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connection and how they operate and what could be done to get rid of them.

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(1318) Q. At the recess, Mr. Cantellops, you were telling us about a conversation that you had in the car on the way down.

. After this conversation did you have occasion to go back to that area? A. Later on, yes.

Q. And when was that, as best you can recall? A. The early part of September.

Q. What did you do up there? A. I make a delivery over there.

Q. Prior to the delivery did you have a conversation with anybody? A. I saw John Ormento there.

Q. What did he say to you? A. He told me that I have to take the stuff to Fox Street, 950, some place on Fox Street. I was told where to pick and where to go.

Q. What did he tell you about picking up the stuff? (1319) A. I pick in the same neighborhood of Washington Heights.

Q. What did he tell you about the delivery? A. I went to a direct address at that time, to an apartment there.

The Court: An apartment where?

The Witness: In Fox Street, if I recall, 958 or 956 Fox Street.

Q. In the Bronx is it? A. Yes.

Q. After this conversation with Ormento what did you do? A. I did as he told me and make the delivery and I went to that place.

Transcript of Hearing on Motion for Contempt

(1)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

64 Cr. 897

[SAME TITLE]

Before:

HON. WILLIAM B. HERLANDS,

District Judge.

New York, N. Y.,

October 28, 1964,

11:05 a .m.

Appearances:

ROBERT M. MORGENTHAU, Esq.,

United States Attorney,

For the Government;

WILLIAM M. TENDY, Esq. and

ANDREW M. LAWLEE, Esq.,

Assistant United States Attorneys.

LAURITANO, SCHLACTER & SCHNEIDER, Esqs.,

Attorneys for Defendant;

JACOB KOSSMAN, Esq. and

PHILIP R. EDELBAUM, Esq., of Counsel.

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The Court: The Court will now proceed with the contempt matter. The further call of the calendar will be held in abeyance.

Are both sides ready?

Mr. Lawler: The Government is ready, your Honor.

The Court: All right.

Mr. Kossman: If the Court please, I would like the record to show that we would like to be tried in this case by a jury.

The Court: On what ground?

Mr. Kossman: Well, on the ground that a person under the Fifth Amendment is entitled to a trial by jury, and we say that that extends to and encompasses even a criminal contempt.

Mr. Lawler: Your Honor, the Government's position is that under the holding of *United States vs. Barnett* that the defendant is not entitled as of right to a trial by jury. This is a contempt hearing brought on by an order to show cause under Section 42 (b)—Rule 42 (b) of the Rules of Criminal Procedure, and as such should be heard by your Honor with a jury.

The Court: In *United States vs. Barnett*, 376 U. S. 681, the Court was divided on the issue there presented (3) and I presume that Mr. Kossman desires to make a record here so as to preserve for appellate review the issue of whether or not a criminal contempt of this kind and character, plus such punishment as may possibly be imposed, in view of the reasoning of some of the Judges in the *Barnett* case, might present an issue that should be resolved in favor of the defendant.

Mr. Kossman: That is right.

The Court: Whether here or in some other court.

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Mr. Kossman: That is right.

The Court: It is noted. I feel that in light of the law at the present time I am constrained to deny the application of Mr. Kossman for a trial by jury.

Mr. Lawler: Your Honor, might we have the witness sitting at the second table, please?

The Court: The record will show that Andimo Pappadio is now seated at the table with his counsel.

Mr. Lawler: Your Honor, if I might make a brief preliminary statement.

The Court: All right, proceed.

Mr. Lawler: Your Honor, this is a hearing which was brought on by an order to show cause signed by your Honor. The order to show cause which set up this (4) hearing was for the purpose of determining why the witness Andimo Pappadio should not be held in contempt for his refusal to answer certain questions before the grand jury on October 13th of this year.

The background, very briefly, your Honor, is that the witness appeared on three separate occasions in the early part of 1964 before a federal grand jury which was then inquiring into alleged violations of the Federal Narcotic laws.

On August 4th an application was made by the United States Attorney to have the witness Andimo Pappadio granted immunity pursuant to the provisions of Title 18, Section 1406. On August 4th the matter was heard before Judge MacMahon in Room 318.

At that time Judge MacMahon stated that all the provisions of Section 1406 had been complied with, and he ordered the witness Andimo Pappadio to answer certain questions, after explaining to him that he had been granted full and complete immunity.

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Thereafter Andimo Pappadio returned on August 4th and refused to answer the questions as directed. He again appeared on October 6th and again refused to answer questions as directed. On October 8th he was brought before your Honor in this courtroom, at which time your Honor (5) again explained to him that he had been granted full and complete immunity and that he was required to answer questions as directed. Thereafter on October 9th the witness appeared before the grand jury and answered certain questions.

On October 13th he was again brought before the grand jury to answer certain specific questions and he refused to answer those questions. He was brought before your Honor and your Honor asked or directed him to answer those questions.

Again that same afternoon he was brought back before the grand jury and again he refused to answer those questions.

The position of the Government is that the witness Andimo Pappadio is in contempt of an order of this Court in his refusal or for his refusal to answer the questions on October 13th.

That very briefly is the background of this case, and the Government is prepared to go ahead with its proof at this time.

The Court: Without going into any details but simply for the purpose of sharpening the focus, how many questions are involved?

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Mr. Lawler: I believe there are five questions, your Honor.

The Court: Five specific questions that you say he refused to answer?

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Mr. Lawler: On October 13th.

The Court: And the refusal to answer those five specific questions are the predicate for this instant proceeding?

Mr. Lawler: That is correct, your Honor.

The Court: Would you want to make an opening statement, Mr. Kossman?

Mr. Kossman: Well, if the Court pleases—

The Court: It would be helpful to me if you did.

Mr. Kossman: If it is your Honor's wish I will make an opening statement.

The Court: It is not a direction.

Mr. Kossman: I appreciate that. If the Court please, this is a most unusual contempt proceeding. It is not the ordinary type of contempt proceeding. After he was ordered to answer by the Court—I don't know, forty or fifty questions—and then we had argument before your Honor, and your Honor ordered him to answer the questions, he was willing—and I would like to call your (7) Honor's attention to the fact that as of now, although the district attorney was kind enough to show me the original transcript of testimony before the grand jury, I still don't have it, so the exact words in terms of the questions and the exact words in terms of the answers, I cannot quote verbatim—but he was willing to answer every single question of the original order for which the Government sought to give him immunity, and which the Judge explained to him—the Court at that time was Judge MacMahon; and after your Honor overruled the various objections that were made on the ground of relevancy and others, he was willing to answer every single one of those questions.

Now, when he came back on October 8th—when he came back to have him before your Honor, and agreed to, the Government said—

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The Court: You are not clear in the last statement you made. You said October 8th—

Mr. Kossman: After October 8th, when he agreed to answer all the questions that two Courts had already directed him to answer, he came back to the grand jury on October 9th, on Friday. That is not in the Government's affidavit. I mean October 9th, through inadvertence, (8) was eliminated; there is just a slight error.

So he came back on October 9th, and they began to ask certain questions that he had been ordered to— "Are you in the narcotic business?"—of course, I say I have to go vaguely because I don't have the questions in front of me—and he answered, "No."

"Are you a member of this group?" He said, "No."

There were forty or fifty questions, and I represent to your Honor that he was prepared to answer every single one of them.

Now, they then went into a new series of questions, and these are the four or five questions which are before your Honor, and I submit that these questions—I mean, with all respect to the Government and the good faith they have in presenting a case before the Court—I submit that in my, well, thirty years experience I have seen a lot of contempt cases, but I have never seen a contempt case come up on these four or five questions, from the very nature of it.

The Court: Just a minute, Mr. Kossman, because I want to understand you. Assuming there are five questions, is it admitted that your client did not answer them?

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Mr. Kossman: It is admitted—he answered them by—which is not made clear by the Government's affidavit—he took the First Amendment, he took the Fifth Amend-

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ment, and he took the Sixth Amendment, and we have filed an answer—

The Court: In other words, he answered them by claiming certain constitutional privileges?

Mr. Kossman: That's correct, and this is the difference between this case and—

The Court: Just wait a minute. We will get it all, because it is a very simple situation.

Mr. Kossman: All right.

The Court: There are five questions that he declined to answer on the ground that he had certain constitutional privileges?

Mr. Kossman: That's correct.

The Court: Which were stated on the record?

Mr. Kossman: It may be that there are only four questions. I discussed with Mr. Lawler that one of the last questions he may have asked, like, "How many meetings were there?", and the defendant, because he is a defendant in this case, he is no longer a witness—the defendant believes that he did answer somewhere, (10) and again, as I say, and it is not the fault of the district attorney—

The Court: Leaving out matters of protocol and getting down to the facts, whether it is four questions or five questions will be developed.

Mr. Kossman: Yes.

The Court: But whatever it is, your client declined to answer on the ground that he had a right not to answer because of constitutional privileges that he asserted; is that right?

Mr. Kossman: That's correct.

The Court: Is it your contention that he has the privilege, or is it your contention that there is some procedural flaw in that the questions that are the predicate of this

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proceeding were questions which were not brought before the Court and explained to this defendant by the exposition of Section 1406, Title 18?

Mr. Kossman: No, I don't—

The Court: Because in the chronology of the proceeding you have created the impression, at least in my mind, that whereas a number of questions had been the subject of explanation by Judge McMahon and myself, and the impact of Section 1406 was explained to the defendant, (11) and that the defendant answered those questions, that what happened was that the prosecution or Government then proceeded to ask new questions, or as you put it, a new series of questions.

Are you claiming that the new series of questions, assuming they were a new series, were not encompassed within any of the instructions given by Judge MacMahon and by me?

Mr. Kossman: Well, obviously they were not encompassed by the instructions given by Judge MacMahon, because—

The Court: What about my instructions?

Mr. Kossman: —but they are encompassed by your instructions.

The Court: Let us put aside some of the possible contentions. You are not claiming that these questions are new questions in the sense that he had never been instructed by the Court to answer them?

Mr. Kossman: That is correct, but I am claiming, as long as we are talking procedure, that when the Government—

The Court: Will you answer my question: you are not claiming that your client was not given the (12) appropriate instructions to answer?

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Mr. Kossman: That's correct.

The Court: All right. What are you claiming as your contention?

Mr. Kossman: From a procedural standpoint?

The Court: From any standpoint. I just want to know what your argument is, without characterizing it.

Mr. Kossman: We filed an answer—I don't know if it is before your Honor. We filed that yesterday and we served a copy.

The Court: For purposes of an opening statement, you tell me what you are claiming.

Mr. Kossman: Here is what we are claiming: that when the Government originally asked permission from the Attorney General, according to the statute, that it was in the public interest that he be ordered to answer certain questions, and they must have—I say, must have—I mean, they must have notified the Attorney General that these are the questions we asked him, because the answer comes back that in all probability he was going to plead the Fifth Amendment and plead privilege, and so on and so forth, and we therefore authorize you for a grant of immunity, we say this: that these questions, these four (13) questions were never, or five questions, were never presented to the Attorney General's office, and--

The Court: You claim that that is a fatal defect; is that right?

Mr. Kossman: I say that is a defect in the sense that the original grant of immunity, which has to be in a certain sense strictly construed against the Government, and strictly construed in the sense of trying to—

The Court: Mr. Kossman, without going into all the details because there will be time for that, your contention is that these four or five questions were not encompassed

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within the letter or direction or authority of the Attorney General, which is a condition precedent to the conferring of immunity under Section 1406.

Mr. Kossman: That is correct.

The Court: And consequently, with regard to these four or five questions, the Government was not in a position to ask the Court to confer immunity on this defendant because there is lacking one of the steps that the statute requires.

Mr. Kossman: That is correct.

The Court: Is that what it is?

(14)

Mr. Kossman: That is one of the contentions.

The Court: What is the second contention?

Mr. Kossman: The other contentions are these: He has an indictment—when I say “he” I mean the defendant.

The Court: You mean the outstanding indictment?

Mr. Kossman: Yes. Now, a grant of immunity, all the cases hold, doesn’t wash out that indictment. That indictment is there. The grant of immunity is a defense.

Now, it seems that an indictment that has been outstanding six and a half years, that the Government certainly doesn’t have the desire to drop that indictment, because if it did drop the indictment, it certainly would influence the defendant in answering some of these particular questions.

The Court: You claim that notwithstanding the comprehensive grant of immunity contained in Section 1406, the fact that there is an indictment pending creates such a situation that the defendant is justified in refusing to answer these questions.

Mr. Kossman: Especially these questions because—

The Court: Because they relate to his defense.

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(15)

Mr. Kossman: Because they relate not only to his defense but preparation for defense and consultation with attorneys and with witnesses, and, therefore, since there is outstanding this particular indictment, and perhaps the Government may take the position that he never gave them any evidence, even though they gave him immunity, and therefore they want to proceed with that particular indictment, he has a right to go around and see people.

This is the most unusual—

The Court: All right. What is the third contention?

Mr. Kossman: The next one, the thrust is this: The assistant district attorney, in fairness—I mean it is really fair—stated to the defendant, at that time the witness, “that there was testimony that I attended a meeting” where the distribution of narcotics was discussed.

The assistant district attorney also stated, “it has been alleged” that I am a member of a particular group involved in a number of illegal activities.

Now, the defendant, at that time the witness, told the grand jury that he was not a member of the group, and he didn’t attend any meetings where the distribution of narcotics was discussed.

This is a terrible situation, and I will tell (16) you why and how he is squeezed. Here is an individual, if he kept silent, if he refused to say anything, the most that could happen—I don’t know what the status of the law is—I mean, is a year, six months, two years or eighteen months for contempt.

By answering—and he did know the penalties; I explained the penalties to him—by answering he subjects himself to prosecution for perjury for which he can get

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five years. Since there is a couple of them, he can get ten or fifteen years, forgetting now about the narcotics thing.

The Government says, "We have witnesses that say that you are involved in a group. We have witnesses, so to speak, that you sold narcotics." He says, "That is not so; that is a lie."

Now, under those circumstances, your Honor, he must prepare for a pending perjury indictment. Someone is committing perjury.

Now, we have attached the testimony of the Cantellops case—that is six and a half years ago—where Cantellops says that the defendant was present there. And this is the point involved: the immunity statute does not give you immunity for perjury. The only thing (17) immunity gives you is protection against the Fifth Amendment. It doesn't give you protection against the Sixth Amendment. It doesn't give you protection against perjury.

And, therefore, in the circumstances of the case—in other words, this is not just someone coming up and saying, "I refuse to answer this question because I will be guilty of perjury," because he will say, "Where is the showing?"

Now, we have made the showing by analogy with the Fifth Amendment cases, where Judge Learned Hand in *United States vs. Weissman*—I think it is 111 or 112 Fed. 2d—said that you have to push the door open a little bit, ajar, in order to show that there is a basis for claiming the privilege.

By analogy we not only pushed the door open; we have knocked the door down.

The Court: Your first contention then is that while ordinarily an immunity statute is perfectly proper if it grants immunity against prosecution, and the use of testimony and any acts or transactions disclosed by such testimony,

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except for perjury committed in the course of the testimony, that in this particular case this represents (18) an exception to that rule in that you have made a showing which indicates that there is a clear and present danger that this defendant is in the process of being the target of a perjury prosecution, and that he therefore has a right to claim his privilege with respect to a possible prosecution for perjury growing out of the testimony which is the subject matter of this grand jury investigation.

Is that your contention?

Mr. Kossman: That is one of the contentions. The other contention is that he therefore has a right to prepare to meet that, and that takes in the Sixth Amendment; I mean the right of meeting witnesses and meeting lawyers and preparing his defense. He does not have to disclose to the Government the witnesses that he sees in order to show that it is the Government people that committed perjury.

The Court: In other words, you claim that while ordinarily an immunity statute can except perjury committed in the course of the testimony elicited pursuant to the immunity statute, that where there is a perjury case in the process of being made, ostensibly, that a whole constellation of rights are generated in favor of (19) the defendant vis-a-vis that potential perjury case?

Mr. Kossman: That is correct.

The Court: All right, I don't want to take up time with legal arguments at this time. Are those your major contentions?

Mr. Kossman: Of course, the next proposition is this—I will say two more but I will make it very brief. The question is about the relevancy.

Now, I have cited that in *Brown vs. United States*—

The Court: In other words, you claim that the questions

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were not material or relevant to the grand jury investigation.

Mr. Kossman: So much so that they did not even bear a reasonable relationship.

The Court: All right, we will come to that. I just want to get your contention.

Mr. Kossman: And then, of course, the question of interference with lawyers. We say, from the type of questions the Government has no right—and he is a defendant in a criminal case—the Government has no right to survey a defendant. They have been raising it in various cases, that they don't survey defendants, they only survey other people. The defendants accidentally (20) happen to be present.

The Court: What do you mean by "survey"?

Mr. Kossman: We say that they have no right to survey a defendant and try to interfere with his defense while he is preparing for a defense, and the Government—

The Court: I just wanted to get your contentions.

Mr. Kossman: Now, if they have the right to survey—

The Court: I will hear your argument at the end of the evidence.

Mr. Kossman: Thank you.

Mr. Lawler: Shall we go ahead with our evidence at this time, your Honor?

The Court: Go ahead.

Mr. Lawler: Your Honor, what has been marked Government's Exhibit 1 for Identification is a copy of a grand jury subpoena. I believe Mr. Kossman will stipulate that this subpoena was served on the defendant Andimo Pappadio on February 3, 1964.

At this time I would offer the subpoena in evidence, your Honor.

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(21)

The Court: Show it to him, please.

(Exhibit is handed to Mr. Kossman.)

The Court: Is there any objection?

Mr. Kossman: No.

The Court: There being no objection, Exhibit 1 is received in evidence.

(Government's Exhibit 1 received in evidence.)

Mr. Lawler: Your Honor, as to the next exhibit, which has already been marked Government's Exhibit 3 for identification, I would like to state at this time that that is the affidavit of United States Attorney Robert M. Morgenthau which makes application under the provisions of Section 1406 to have the defendant, or at that time the witness, granted immunity.

Attached to that affidavit is a letter from the Attorney General of the United States expressing approval of this application.

At this time I would like to call your Honor's attention to certain wording in that letter wherein the Attorney General states that he understands that the testimony of the witness Pappadio is essential and he agrees that it is in the public interest to grant him immunity and to obtain his testimony. It in no way limits the (22) Government to any particular questions, but speaks generally of the testimony of the witness Pappadio.

Mr. Kossman: I have no objection.

The Court: There being no objection, Exhibit 3 is received in evidence.

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(Government's Exhibit 3 received in evidence.)

Mr. Lawler: Your Honor, Government's Exhibit 2 for identification is an order of Judge MacMahon dated August 4, 1964, stating that subject to the provisions of Title 18, Section 1406, Andimo Pappadio is hereby instructed to answer the questions propounded to him before the grand jury. I have paraphrased that, but I will offer the entire order.

The Court: Any objection?

Mr. Kossman: No.

The Court: Received.

(Government's Exhibit 2 for Identification received in evidence.)

Mr. Lawler: Your Honor, the additional exhibits which the Government would offer consist of the transcripts of grand jury testimony. I have spoken to Mr. Kossman and I believe that with respect to all of these transcripts he is willing to make a stipulation that if the (23) grand jury stenographers were called they would testify that this is an accurate transcription of what took place in the grand jury.

Is that correct?

Mr. Kossman: Yes.

The Court: How many sections are involved in this exhibit?

Mr. Lawler: They are all marked as separate exhibits. As I offer them I will read the dates.

The Court: All right.

Mr. Lawler: Exhibit 4 for Identification is the appearance of the witness before the grand jury on February 14, 1964.

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The Court: Received.

(Government's Exhibit 4 for Identification received in evidence.)

Mr. Lawler: Government's Exhibit 5 for Identification is the appearance of the witness on April 24, 1964.

The Court: Received.

(Government's Exhibit 5 for Identification received in evidence.)

Mr. Lawler: Government's Exhibit 6 for Identification (24) is the appearance of the witness on May 8, 1964.

The Court: Received.

(Government's Exhibit 6 for Identification received in evidence.)

Mr. Lawler: Government's Exhibit 7 for Identification is the appearance before Judge MacMahon on August 4, 1964, at which time the witness was granted immunity.

The Court: Received.

(Government's Exhibit 7 for Identification received in evidence.)

Mr. Lawler: Government's Exhibit 8 for Identification, your Honor, is the appearance of the witness Pappadio before the grand jury that same day, that afternoon, August 4, 1964.

The Court: Received.

(Government's Exhibit 8 for Identification received in evidence.)

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Mr. Lawler: Government's Exhibit 9 is the appearance of the witness on October 6, 1964.

The Court: Received.

(Government's Exhibit 9 for Identification received in evidence.)

(25)

Mr. Lawler: Government's Exhibit 10 for Identification is the appearance of the witness on October 8, 1964, which includes his appearance before your Honor.

The Court: Received.

(Government's Exhibit 10 for Identification received in evidence.)

Mr. Lawler: Exhibit 11 is the appearance of the witness on October 9, 1964.

The Court: Received.

(Government's Exhibit 11 for Identification received in evidence.)

Mr. Lawler: Government's Exhibit 12 is the appearance of the witness before the grand jury on October 13, 1964. This includes the portion of the proceedings when the witness was brought before your Honor and when your Honor instructed him to answer these certain questions which are involved in the contempt proceedings at this time, and a subsequent appearance before the grand jury that same day, including his refusal to answer those questions as directed.

The Court: In other words, when he appeared before me on October 13, 1964, this exhibit shows that I instructed

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him to answer, among others, the questions that are the predicate of this contempt proceeding?

(26)

Mr. Lawler: That is correct, your Honor. It also includes his refusal that same day to answer those questions.

The Court: Received.

(Government's Exhibit 12 for Identification received in evidence.)

Mr. Lawler: Your Honor, at this time I believe that Mr. Kossman will also stipulate that the grand jury that Mr. Pappadio appeared before was a grand jury which was properly impaneled in September of 1963, and which at the time the witness was called to testify before it was investigating alleged violations of the Federal Narcotic laws.

Mr. Kossman: That is correct.

The Court: Is it so stipulated, Mr. Kossman?

Mr. Kossman: That is correct.

Mr. Lawler: Your Honor, that will constitute the Government's direct case.

The Court: Does the Government rest?

Mr. Lawler: The Government rests, your Honor.

Mr. Kossman: Well, if the Court pleases, I move for a judgment of acquittal. Is it your practice to hear argument now?

(27)

The Court: May I ask you this: In the event that I should deny your motion, are you prepared to call witnesses?

Mr. Kossman: Well, we do have our answer in. No, I will not call witnesses. I may wish to introduce one or two exhibits but I will not call any witnesses.

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The Court: All right, I will hear you now in support of your motion. First tell me what the motion is.

Mr. Kossman: The motion is for judgment of acquittal at the end of the Government's case.

Unfortunately, the four questions or the five questions are smothered in, I don't know, perhaps one hundred questions that have been asked.

The Court: In the interests of clarity, Mr. Lawler, will you now read into the record for the guidance of counsel, so that there won't be any question, the four or five questions specifically that are the gravamen of this proceeding.

Mr. Lawler: I will, your Honor.

The Court: So that we will get that on the record beyond any controversy.

Mr. Lawler: I am now reading from Government's (28) Exhibit 12 in evidence.

The Court: Do you have a copy of Exhibit 12 for me?

Mr. Lawler: I do not right now. I just received it. I will have a copy available later.

The Court: Very well, go ahead.

Mr. Lawler: The first question is:

"Q. Mr. Pappadio, who are the attorneys who were present at these meetings?

"A. I respectfully decline to answer on the grounds of the First, Fifth and Sixth Amendment.

"Q. Aside from the meetings which you described, which took place in the street, where else did you meet with Luchese?

"A. I decline to answer under the First, the Fifth and the Sixth Amendments.

"Q. Who else was present at these meetings besides yourself, Luchese and the attorneys?

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"A. I respectfully decline to answer under the First, Fifth and Sixth Amendments.

"Q. All right. How many of such meetings were there?

"A. I respectfully decline to answer on the grounds of the First, Fifth and Sixth Amendment.

(29)

"Q. Where did the meetings take place?

"A. I respectfully decline under the First, Fifth and Sixth Amendment."

Those are the questions involved, your Honor. And may the record also reflect that prior to our coming before your Honor I made this available to Mr. Kossman, who copied down the questions verbatim, I believe.

Mr. Kossman: Except that—

The Court: Just a minute, Mr. Kossman. You have read from what exhibit?

Mr. Lawler: Government's Exhibit 12.

The Court: How many pages does that consist of?

Mr. Lawler: Government's Exhibit 12 is not numbered, your Honor. It is numbered but by the different grand jury stenographers.

The Court: Are these consecutive questions that you read?

Mr. Lawler: The first three questions were consecutive and the next two appear on the next page.

The Court: While Mr. Kossman is talking, will you count the number of pages in that exhibit?

Mr. Lawler: I will, your Honor.

The Court: Go ahead, Mr. Kossman.

(30)

Mr. Kossman: If the Court pleases, while I was shown by the assistant district attorney the transcript—

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The Court: Do you want more time?

Mr. Kossman: No. I mean, I did call his attention to the fact that I think one of these questions was answered somewhere along the line, about how many of such meetings there were. I think he said something about, I don't know, four or five, or so many. So I called his attention to that.

Of course, I had the handicap of not having that transcript—

The Court: Well, do you want an adjournment?

Mr. Kossman: Well, I will take an adjournment so we can have more time to study these things.

The Court: All right. Suppose you argue any matters that you think you are able to argue now without the adjournment.

Mr. Kossman: Now, the next thing is this: I think it is important, of course, that if a man is charged with unlawfully defying the order of the court, it is therefore important in terms of a conflict, when a man has answered, I don't know, forty questions or thirty questions, that your Honor should be apprized and should read those (31) particular questions and those answers going on to wilfulness—

The Court: I shall read all the papers and all the exhibits.

Mr. Kossman: So that would throw light on the individual's—

The Court: You claim that if he answered forty or fifty questions and refuses to answer five questions, that is material and relevant on the issue of wilfulness and contumaciousness to consider that he did answer the other questions.

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Mr. Kossman: Especially, your Honor, these questions. If he had refused to answer a question, am I in the narcotics business—

The Court: I have the point of your argument. I shall read all the evidence in its totality before I make any findings or conclusions. I will not read only the part that the Government is selecting, but I will read everything that you wish to bring out.

Mr. Kossman: I couldn't ask for more.

The Court: All right.

Mr. Kossman: Aside from the other argument that I have presented in the opening, without repeating, I would (32) like to call your Honor's attention to the fact that relevancy is a requirement that has been accepted by the Supreme Court and this court. In *Brown vs. United States*, 359 U. S. 41, at 42, the court stated:

"He was then asked six further questions concededly relevant to the grand jury's inquiry."

In *Ullman vs. United States*—

The Court: There is no doubt about the fact that the questions must be material and relevant to the grand jury's inquiry.

Mr. Kossman: That is correct.

The Court: All right. There is no dispute about that, is there, Mr. Lawler?

Mr. Lawler: No, there is no dispute about that, your Honor.

The Court: You claim that on the face of the record here the questions are not shown to be material and relevant.

Mr. Kossman: That is correct; no showing by the Government. And just to cite the last case, *Pagano*, 171 Fed. Supp. 435, the Court there stated:

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"It is plain from a reading of the questions that all of them were so related and were relevant and (33) pertinent to the grand jury's inquiry as to the illegal narcotics traffic and control."

The Court: There is no dispute as to the law, on that point at least.

Mr. Kossman: Now, the next proposition is this, and I am arguing my motion for judgment of acquittal: On the face of Judge MacMahon's order—and that is part of the Government's case—Judge MacMahon stated, "You are further advised that the grant of immunity," skipping six lines, "except that you will not be exempt from prosecution for perjury."

Now, this doesn't talk of conviction; it talks about prosecution for perjury. Now, therefore, you have a statute that says you get immunity for everything you testify about except from prosecution for perjury.

Now someone has to be—and it isn't going to be the Government's witnesses before the McClellan Committee—and this is part of the record, because if your Honor reads the transcript, you will read—and as I say, the assistant district attorney was most fair: "I want to advise you that there has been testimony before a senate committee."

The Court: Do you have any citations?

Mr. Kossman: Well, you ask me if I have citations. There is—

(34)

The Court: The answer is yes or no.

Mr. Kossman: The answer is, if the Court please—

The Court: Do you want time for a memorandum?

Mr. Kossman: I would appreciate time for a memorandum.

The Court: All right.

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Mr. Kossman: I mean, there is just general law, but specifically I don't have any.

The Court: I want it specifically.

Mr. Kossman: Specifically, I will have to ask for indulgence.

The Court: All right.

Mr. Kossman: My thought is that therefore this is a prosecution for perjury for which he is not given immunity. A prosecution for perjury must follow. I mean, when I say it must follow, when the Government tells you that there has been testimony before a senate committee and statements—

The Court: You mean it is an irresistible conclusion.

Mr. Kossman: I would say it is an irresistible conclusion, and I would say, if your Honor pleases, you would have to take into consideration the fact that the (35) defendant who is faced with the proposition that if he refused to say a word, the most he could have gotten was contempt, yet truthfully—he says truthfully—and your Honor's experience over all these years—

The Court: Leaving out protocol and getting down to the question of your contention, you claim that he was faced with imminent perjury prosecution, and that, therefore, gives him a certain privilege which otherwise would not exist under the usual immunity statutes, including Section 1406?

Mr. Kossman: That is correct.

The Court: I don't want to take up time for further argument on that.

Mr. Kossman: Especially the Sixth Amendment, through the attorney-client relationship; that gives him a right, because these questions involve attorneys. If he is meeting with attorneys and various witnesses in order to show that

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there was perjury committed by Government officials in 1963—when I say Government officials I mean officials who testified—

The Court: You claim that taking all these questions in context, in the aggregate, that by requiring him to answer questions involving or relating to meetings with (36) attorneys and witnesses, that that impinges upon his Sixth Amendment right to counsel?

Mr. Kossman: That is correct.

The Court: And that, therefore, his refusal or declination to answer is justified?

Mr. Kossman: That is correct, as well as the First Amendment.

The Court: All right.

Mr. Kossman: Now I would like to cite another case to your Honor—

The Court: You save that for your memorandum.

Mr. Kossman: All right. Now I would like to point this out—

The Court: I will reserve decision on your motion.

Mr. Kossman: I would like—

The Court: Do you want to put witnesses on?

Mr. Kossman: No.

The Court: Do you want to introduce exhibits?

Mr. Kossman: I will introduce just one exhibit; in view of the fact that the Government, as I say, had stated these things to be so, I was prepared to bring in the transcript of the testimony before the senate committee last September—

(37)

The Court: Wait a minute. You started out by saying that in view of the fact that the Government said this is so. What do you mean by that?

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Mr. Kossman: In other words, in view of the fact that the Government says, "I want to advise you that there has been testimony before a senate committee"—

The Court: You are going too fast; I don't understand you.

Mr. Kossman: The Government before Judge MacMahon—I mean, one of the questions that came out: "I want to advise you that there has been testimony before a senate committee and statements have been made to federal law enforcement agencies," that, therefore, since there is that concession by the Government, I am only asking out of an abundance of caution—

The Court: Do you want them to concede the factual accuracy of that statement?

Mr. Kossman: Yes.

The Court: Mr. Lawler, do you concede the factual accuracy of the statement of fact that is contained in that question?

Mr. Lawler: That there has been testimony to a Government agency?

(38)

The Court: The part that Mr. Kossman just quoted.

Mr. Kossman: And statements were made.

Mr. Lawler: Your Honor, there have been statements made to governmental agencies.

The Court: All right.

Mr. Kossman: The second part—and this will save time—another question directed to the witness before the grand jury was:

"At the narcotics trial of Vito Genovese there was testimony that you attended a meeting at the home of Rocco Massey. Did you attend this meeting?"

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I have attached in our answer the actual transcript of that, but would your Honor ask the Government if they would concede that that is correct?

The Court: Is that statement correct?

Mr. Lawler: There was such testimony.

The Court: It is so stipulated on the record.

Mr. Kossman: Then under those circumstances I would like to offer this as an exhibit, a docket entry, Defendant's Exhibit A.

The Court: Have you shown it to your adversary?
(39)

(Document is handed to Mr. Lawler.)

The Court: Is there any objection?

Mr. Lawler: No objection.

The Court: Received.

(Defendant's Exhibit A received in evidence.)

The Court: Let me look at it, please.

(Exhibit is handed to the Court.)

The Court: At the conclusion of the hearing, gentlemen, will you leave all exhibits with the Clerk so that I can read them.

I notice on Exhibit A, Mr. Kossman, the caption is, "United States vs. Andimo Pappadio," and that on December 1, 1958, the Government moved to sever Pappadio, and that Judge Bicks granted the motion.

I assume that there were other defendants.

Mr. Kossman: Yes.

The Court: Because the caption does not say, "Andimo Pappadio, et al."

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Mr. Kossman: I am sorry, your Honor.

The Court: It only says, "Andimo Pappadio, defendant," but actually there were codefendants.

Mr. Kossman: There were codefendants.

The Court: All right. I want the record to show that. Is that correct, Mr. Lawler?

(40)

Mr. Lawler: That is correct, your Honor.

The Court: All right, go ahead.

Mr. Kossman: Now, the last thing is that I would like to have a concession from the Government that Mr. Pappadio is still a defendant in this particular case and that his trial has not yet been set.

The Court: You mean the case of United States vs. Pappadio, et al., C. 156-157? Is that the case?

Mr. Kossman: That is correct.

Mr. Lawler: Your Honor, the Government will concede that there is still an outstanding indictment against Andimo Pappadio and the case is not presently on the trial calendar.

The Court: And that indictment is the indictment filed July 7, 1959?

Mr. Lawler: That is correct, your Honor.

Mr. Kossman: The only thing left is that I would like to have, in order to write a memorandum for your Honor, a transcript of what took place here.

The Court: Have you ordered it?

Mr. Kossman: Well, I now order it.

The Court: You will have to get out rush copy because we are adjourning until tomorrow morning.

(41) Mr. Kossman: I beg your pardon, tomorrow morning?

Mr. Lawler: Your Honor, might I just say this with respect to the statement I just made concerning the out-

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standing indictment against Andimo Pappadio: with respect to the other defendants who did stand trial, there are issues in that case which are still presently on appeal.

The Court: Would you repeat that, Mr. Lawler?

Mr. Lawler: That case is presently in the appellate courts. The Genovese case was recently affirmed by the Court of Appeals on a certain issue and is now presently before the Supreme Court. I believe a cert has been filed.

The Court: Has certiorari been granted?

Mr. Lawler: Cert has not been granted as yet.

The Court: You mean a petition for certiorari has been filed?

Mr. Lawler: That is my understanding..

Mr. Edelbaum: It is in the process of being filed. The Circuit Court's decision just came down, I believe a week or two ago. Cert has been granted and the case was remanded to the Circuit Court.

The Court: Is that the case where Judge Waterman (42) wrote the opinion?

Mr. Edelbaum: Yes, your Honor.

The Court: All right.

Mr. Kossman: The last thing—I hope it is the last thing, your Honor—that I would like to have is a copy, and previously the Government couldn't give it to me unless you ordered it, a copy of all the grand jury testimony that—

The Court: You mean a copy of the exhibits?

Mr. Kossman: A copy of the exhibits.

Mr. Lawler: We will provide defense counsel with copies of the exhibits.

The Court: All right, so ordered.

Mr. Kossman: But, your Honor—

The Court: When will you give it to counsel, Mr. Lawler?

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Mr. Lawler: This afternoon.

The Court: Instead of adjourning this case until tomorrow morning, under the circumstances, I will adjourn it to Friday morning so as to give counsel the opportunity to read the exhibits and to prepare a memorandum, it now being twelve noon, Wednesday.

Mr. Kossman: Thank you very much.

The Court: We will adjourn the case until (43) ninety-three Friday morning.

Mr. Kossman: And I would like for the record to renew my motion for judgment of acquittal on the basis of the defendant having rested.

Mr. Edelbaum says that he wishes to say something to your Honor; so maybe we will hold that motion for a judgment of acquittal until Mr. Edelbaum has said something.

Mr. Edelbaum: Your Honor, one further point is that the only order granting this defendant immunity was the order of Judge MacMahon, although there were further proceedings before your Honor.

The Court: Do you claim, Mr. Edelbaum, that there is on file only one order granting immunity?

Mr. Edelbaum: Yes.

The Court: That being the order of Judge MacMahon, Exhibit 2, and that consequently any further proceedings that were had in this matter after the date of Judge MacMahon's order, August 4, 1964, particularly questions not encompassed within Judge MacMahon's order—

Mr. Edelbaum: No, your Honor, that is not my point.

The Court: What is your point?

(44)

Mr. Edelbaum: My point is that in the minutes of the proceeding before Judge MacMahon, which I have before me—I am not sure what the exhibit number is—

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Mr. Lawler: Government's Exhibit 7.

Mr. Edelbaum: In Government's Exhibit 7, would your Honor note on the first page that Judge MacMahon ordered Mr. Lauritano, who is the defendant's attorney of record, out of the courtroom, and that Mr. Lauritano was not allowed to take part in the proceeding.

Now, your Honor, in the Pagano case, United States vs. Pagano, which Mr. Kossman has cited, and all other cases where there have been contempt proceedings after the granting of immunity, the Court in its recitation of the facts, especially very clearly in the Pagano case, stated that at the time of the hearing upon the granting of immunity the witness was represented by his attorney, and his attorney at that time had an opportunity to question legally and factually, and an opportunity to call witnesses if needed, the validity of the grant of immunity, whether or not there was a proper basis, a factual basis, and whether it was done properly.

In all of these cases that have gone up on contempt after immunity has been granted, all of the courts (45) have stated that the witness as of right as represented by his attorney at the proceeding, because the witness must object if the immunity is not sufficient, and he has to have an opportunity to object.

Mr. Lauritano was ordered out of the courtroom and then the immunity was granted. Judge MacMahon's order was the same date. The defendant, through his lawyer, never had the opportunity at that time, on this order upon which the whole contempt is based, to raise the validity of the affidavit of Mr. Morgenthau—to raise the sufficiency of the affidavit of Mr. Morgenthau, and to raise the sufficiency of the letter of the Honorable Attorney General, at that time Mr. Robert F. Kennedy.

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So I say, your Honor, the whole order—

The Court: You have an opportunity now, don't you?

Mr. Edelbaum: Yes, your Honor, but the order itself is invalid because at that time there had to be a full hearing. The hearing was held without counsel. It was, in truth, your Honor, a star chamber proceeding. That is the time the defendant has to object.

We cannot now ask your Honor to overrule a Judge of the same court and have the whole hearing anew.

(46)

This is a standing order. Our only basis is to then later appeal. I say this order is not a valid order. We cannot now object to it, your Honor. I am objecting to it on the ground that he was not represented by an attorney, and I also contest the sufficiency, your Honor, of the affidavit.

Now, furthermore, your Honor, I want to point out one thing that Mr. Kossman stated, to make it a little more clear.

The case in which Mr. Cantellops was a witness was the Aviles case, which was just affirmed by the Circuit Court, and in which the defendant Pappadio was originally a defendant.

In the testimony that we have attached, Mr. Cantellops says under oath that Mr. Pappadio was present at a meeting at Rocco Massey's house.

In the grand jury Mr. Pappadio was asked, "Were you ever at a meeting at Rocco Massey's house?" and he says, "No."

He is also asked, "We have information that you are a member of a group and deal with narcotics and there is such testimony." And he says, "I do not deal with narcotics; I am not a member of the group."

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(47)

The only questions that he refused to answer are not these questions as to which the Government has direct sworn testimony. They are only questions of meetings with his lawyers and with his witnesses, and the contention is that as to these meetings he is privileged not to answer because he is preparing a defense for a very real and possible perjury indictment.

And even though his answers are truthful, there is other sworn testimony directly contra, and he has a right to meet with his lawyers, and the fact that he met these lawyers, the people present, and the people he spoke to, is within his privilege, and is a work product of the defense.

Mr. Lawler: Your Honor, as I understand it, there is going to be an adjournment so that defense counsel can view the exhibits and possibly prepare additional arguments that they might have—

Mr. Kossman: We renew the motion for judgment of acquittal.

The Court: Decision reserved.

Mr. Lawler: And in that case, your Honor, the Government would withhold answering any issues raised until all of the issues have been raised rather than attempt to answer them piecemeal at this time.

(48)

The Court: Let me ask you one or two questions so that defense counsel in preparing the memorandum will direct themselves realistically to the issues.

Do you claim, Mr. Lawler, that the contempt allegedly committed by Pappadio was a contempt in refusing to obey the order of Judge MacMahon?

Mr. Lawler: Your Honor, Judge MacMahon considered the application to grant immunity. He explained to the witness that he had been granted full and complete immunity

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and directed him to answer questions. He explained to the witness that he was required to give testimony and he could no longer refuse to testify on the grounds that his answers might tend to incriminate him.

In addition, certain questions were asked, and when the witness refused to answer, he was brought before your Honor, and you again explained the provisions and directed him specifically to answer.

It would be the Government's position that the witness is in contempt of your Honor's order of October 13th, and also the general order of August 4th of Judge MacMahon in which he was ordered to return to the grand jury and give testimony. I believe that was the wording of the order.
(49)

The Court: So that your contention is that the contempt does not consist only of an alleged violation of Judge MacMahon's order, Exhibit 2, but that it also consists of a violation of a direction that I gave the witness when he appeared before me.

Mr. Lawler: On October 13th, that is correct, your Honor.

The Court: I suppose that it would also be inherent in your argument that since the witness and his lawyers and the witness appeared before me on October 8th and October 13th, that if there was any question as to the validity or clarity or scope of Judge MacMahon's order that it could be presented to me.

Mr. Lawler: That is correct, your Honor, and I believe also—

The Court: In other words, the lawyers were here before me, and even assuming *arguendo* there were some force to Mr. Edelbaum's argument, were this to be a case, which it is not, based solely on a violation of Judge MacMahon's order, but assuming that, then the subsequent appearance

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of the witness and his lawyers before me completely protected the rights of the witness.

Mr. Lawler: That is correct, your Honor, and they are also present this morning, and if there was any (50) objection to the procedural regularity of the proceeding of August 4th, again they have an opportunity to raise it.

Mr. Kossman: Well, if the Court please—

Mr. Edelbaum: I raised it, your Honor.

The Court: Well, suppose I were to redirect the witness now to go before the grand jury and to answer these four or five questions, and to go through the explanation all over again about Section 1406, would that obviate your contention?

Mr. Lawler: Your Honor, could I just call to your attention that you did exactly that on October 8th.

The Court: I know, but let us assume they are not satisfied with what I said then, do you want me to do it all over again?

Mr. Kossman: No, Judge.

The Court: Because I am prepared to do it if that is going to be the basis of your argument.

Mr. Edelbaum: No, your Honor.

The Court: Do you understand what I am driving at?

Mr. Edelbaum: Yes, your Honor.

The Court: All right. That means then that you are waiving any argument based on the fact that the (51) witness was not told by a Judge of this court to answer those four or five question.

Mr. Edelbaum: No, your Honor, all I wanted was a clarification from the United States Attorney that we are not faced here solely with Judge MacMahon's order, and with that clarification the argument is withdrawn.

The Court: All right.

Transcript of Hearing on Motion for Contempt

Mr. Kossman: I might settle the whole thing, your Honor—

The Court: You withdraw the argument.

Mr. Kossman: Because Judge MacMahon's order was, "I direct you to return to the grand jury and answer each and every one of the questions."

The Court: Mr. Edelbaum, your colleague, has withdrawn that argument.

Mr. Kossman: So therefore that takes care of it.

The Court: Because otherwise I will go through the whole ritual all over again, because I do believe that there are lawyer-like arguments that you have raised in other respects, and if you want me to decide that, I would be glad to decide that on the merits.

Mr. Kossman: That is correct.

The Court: But if it is a question of who told (52) whom what to do and so forth, then I will go through the whole ritual to obviate those arguments.

Mr. Edelbaum: The record has been clarified on which order he is being held.

The Court: All right.

Mr. Kossman: Your Honor told him in my presence.

The Court: All right.

Mr. Kossman: So there is no problem about that.

The Court: I want the briefs submitted to me by five o'clock tomorrow.

Mr. Kossman: Five o'clock tomorrow?

The Court: Because we are meeting Friday at 9:30 a.m.

The proceedings are now adjourned to Friday, October 30, 1964, at 9:30 a.m. in this room.

Will counsel hand up the exhibits to me, and Mr. Kossman will receive a complete set of the exhibits today.

(Adjourned to Friday, October 30, 1964, at 9:30 a.m.)

**Findings, Conclusions and Decision by
Hon. William B. Herlands, D.J.**

(53)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

64 Cr. 897

[SAME TITLE]

Before:

HON. WILLIAM B. HERLANDS,

District Judge.

New York, N. Y.,

October 30, 1964,

9:45 a. m.

Appearances:

ROBERT M. MORGENTHAU, Esq.,

United States Attorney,

For the Government;

WILLIAM M. TENDY, Esq. and

ANDREW M. LAWLER, JR., Esq.,

Assistant United States Attorneys.

LAURITANO, SCHLACTER & SCHNEIDER, Esqs.,

Attorneys for Defendant;

JACOB KOSSMAN, Esq. and

PHILIP R. EDELBAUM, Esq.,

of counsel.

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(54)

The Clerk: In the matter of Audimo Pappadio.

Mr. Lawler: The Government is ready, your Honor.

The Court: Is there anything to come before the Court, gentlemen, before I read my findings and conclusions?

Mr. Kossman: Did your Honor get a copy of the memorandum that we filed?

The Court: Yes; I not only read your memorandum but I read your cases, all of them.

Mr. Kossman: I wonder if—

The Court: It is a very fine exposition of general principles.

Mr. Kossman: If the Court pleases, I wanted to add the word "not" in the second paragraph on page 8 that has been left out: "Immunity granted do not prevent the right not to disclose."

The Court: The correction will be noted.

Mr. Kossman: There is another one on page 12. Instead of, "There is another absence of wilfulness," it should read, "There is an utter absence of wilfulness."

The Court: That will be noted.

There being nothing else to come before the Court (55) by way of amplification of the record, I will proceed to read into the record my findings and conclusions. After I have finished reading my decision, I will return to the Clerk all of the exhibits in this matter, so that either the Clerk may retain them, with the consent of counsel, or the exhibits will be returned to the United States Attorney, except for the one exhibit that was introduced in behalf of the defendant. In that way the record will be available for further proceedings, if there are any.

The Court having considered the evidence and the documents finds as follows:

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1. Notice of this hearing was given by an order to show cause signed by me on October 14, 1964, and served on Andimo Pappadio, the witness, and his counsel.

2. A grand jury was duly impaneled for this District in September 1963, and subsequently began an investigation into possible violations of the Federal Narcotic laws, which are referred to in Title 18, United States Code, Section 1406. The grand jury was engaged in this investigation on February 14, 1964, April 24, 1964, and May 8, 1964.

3. Andimo Pappadio, the witness, was duly subpoenaed (56) to appear and testify before this grand jury by a valid subpoena dated February 3, 1964.

4. Pursuant to said subpoena, Andimo Pappadio, the witness, did appear and testify before the grand jury on February 14, April 24, and May 8, 1964.

5. On August 4, 1964, in the presence of Pappadio and the grand jury, oral and written application was made by the United States Attorney pursuant to the provisions of Title 18, United States Code, Section 1406, to have the aforesaid Pappadio instructed to testify.

The written application consisted of an affidavit of the United States Attorney and the written approval of the Attorney General.

This application was made to the Hon. Lloyd F. MacMahon, who, after considering the application, found that the United States Attorney had complied with the provisions of Title 18, United States Code, Section 1406, and was entitled to have the Court instruct the witness to testify and produce evidence before the grand jury.

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Judge MacMahon explained to Andimo Pappadio, the witness, that full and absolute immunity from federal and state prosecution would be granted to him with respect to all matters concerning which he might be compelled to testify.

6. All steps were properly taken under the provisions of Title 18, United States Code, Section 1406, so that when Judge MacMahon ordered Pappadio to answer the questions Pappadio was then absolutely immune from prosecution, and was not subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he might testify.

7. On August 4, 1964, Pappadio returned to the grand jury, but then and there refused to answer the questions.

8. On October 6, 1964, Andimo Pappadio again appeared before the same grand jury and refused to answer the questions.

9. On October 8, 1964, Andimo Pappadio was brought before me for an additional instruction. In the presence of Pappadio's attorney I again explained the immunity provisions of Title 18, United States Code, Section 1406. I again informed Pappadio that he had full and complete immunity as to any testimony which he gave before the grand jury, and then instructed Pappadio to return to the grand jury and give testimony.

10. On October 9, 1964, Pappadio appeared before the same grand jury. On this occasion Pappadio answered (58) certain questions but refused to answer other questions on the basis of the First, Fifth and Sixth Amendments.

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11. On October 13, 1964, Pappadio returned before the same grand jury. At this time he refused to answer the same questions which he had refused to answer on October 9, 1964.

Thereafter Pappadio was brought before me, and after hearing argument by his attorney, I ordered Pappadio to return to the grand jury and answer the questions which he had previously refused to answer.

That same afternoon Pappadio appeared before the grand jury and wilfully refused to answer the questions as directed by me.

12. Among the questions that the witness so refused to answer were the following questions which are the predicate of the present contempt proceeding:

“Q. Mr. Pappadio, who are the attorneys who were present at these meetings?

“A. I respectfully decline to answer on the grounds of the First, Fifth and Sixth Amendment.

“Q. Aside from the meetings which you described, which took place in the street, where else did you meet with Lucchese?

(59)

“A. I decline to answer under the First, the Fifth and the Sixth Amendment.

“Q. Who else was present at these meetings besides yourself, Lucchese and the attorneys?

“A. I respectfully decline to answer under the First, Fifth and Sixth Amendment.

• • • • •

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"Q. All right; how many of such meetings were there?

"A. I respectfully decline to answer on the ground of the First, the Fifth and Sixth Amendment.

.

"Q. Where did the meetings take place?

"A. I respectfully decline under the First, the Fifth and the Sixth Amendment."

The aforesaid questions which Pappadio refused to answer on October 13, 1964, were material and pertinent to the grand jury investigation then being conducted. Pappadio's refusal to answer these questions obstructed and hindered the grand jury in its investigation.

13. During the hearing conducted before me on October 28 and October 30, 1964, the United States submitted evidence and full opportunity was given to the (60) witness, Andimo Pappadio, to present evidence. During this hearing Pappadio was at all times represented by counsel.

14. The Court finds that the witness is guilty of a criminal contempt as charged.

Conclusions of law:

1. The Court concludes that the witness is guilty of a criminal contempt as charged.

2. Andimo Pappadio is adjudged guilty of criminal contempt for his wilfull disobedience on October 13, 1964, of a lawful order of the Court. Andimo Pappadio, in refusing to answer questions before the grand jury on October 13,

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1964, wilfully violated the order of Judge MacMahon of August 4, 1964, and my order of October 13, 1964.

3. The Court hereby fixes the punishment as two years. An order to that effect shall be entered forthwith in accordance with Rule 42 (b) of the Federal Rules of Criminal Procedure.

The foregoing portion of my decision consists of numbered findings and conclusions. I should now like to discuss some of the points. This portion of my decision represents an expression of opinion with regard to only a few of the points. Those points that I (61) regard as transparently without merit will not be discussed or adverted to.

It is incorrect to argue, as the witness now does, that the burden of proof would be upon him to show the affirmative fact that the Government has used or is using his testimony in a prosecution, including the prosecution of a now pending indictment against the witness. Should the Government try the witness under the pending indictment, the burden would be on the Government to prove, clearly and convincingly, that all of its proof is derived from sources completely independent of the witness's grand jury testimony, and any clues or leads derived from such testimony.

The burden would be upon the Government to establish the negative fact that none of its evidence is the fruit of the protected tree of the witness's immunized testimony. Such is the teaching of the cases on this point and in analogous situations. *Murphy v. Waterfront Comm'n*, 378 U. S. 52, 103 (1964) (concurring opinion of Mr. Justice White); *Lapides v. United States*, 215 F. 2d 253, 261 n. 10 (2d Cir. 1954) (dissenting opinion) (no disagreement as to this point); cf. *United States v. Tane*, 329 F. 2d 848, 853 (2d

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Cir. 1954); *United States v. Agueci*, 310 F. 2d (62) 817, 834 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963); *United States v. Paroutian*, 299 F. 2d 486, 489 (2d Cir. 1962); *United States v. Coplon*, 185 F. 2d 629, 636 (2d Cir. 1950), cert. denied, 342 U.S. 920 (1952).

The memorandum submitted in behalf of the witness in opposition to the order to show cause does not discuss a single question involved herein. Instead, it is a generalized argument that side-steps the specific matters posed.

Under Title 18 U.S.C. Section 1406, the immunity statute, the Government has the right to obtain truthful testimony from the witness. That is the objective of the provision that excludes the witness's perjury, if any, from the immunizing effect of the statute.

The immunity statute does not create an opportunity for a witness to effect an illusory exchange of real immunity in return for false testimony. There must be a bargain equivalent whereby the Government obtains the truth in exchange for its granting immunity.

That is the purpose of the concluding provisions in Section 1406, which read:

"But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on (63) account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

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Virtually all immunity statutes contain the same or similar provisions with regard to perjury that may be committed by a witness.

The argument advanced in behalf of the witness with regard to a possible perjury prosecution, if accepted, would completely frustrate and nullify the purpose underlying the perjury provision contained in Section 1406 to which I have just alluded.

An order shall be entered in accordance with the directions of the Court hereinabove set forth. So ordered.

Mr. Lawler: May I say something at this time?

(64)

The Court: Yes.

Mr. Lawler: Your Honor, since the primary purpose of this investigation is to obtain testimony or to obtain evidence so that indictments might be filed or voted upon, might I suggest to your Honor that you include a clause in the sentence that if Mr. Pappadio does answer the questions as directed, that a further application may be made to your Honor to reconsider this sentence, so that we will have some coercive effect on Mr. Pappadio.

The Court: Yes, I shall adopt the proposal presented by Assistant United States Attorney Lawler, and my decision shall be deemed to include a provision reading in the form and manner proposed by Mr. Lawler.

There is an exception in favor of the witness.

Mr. Kossman: If the Court pleases, No. 1, I would like to call your Honor's attention to the fact that on October 1, 1964, a case in the District Court of Columbia, Rollerson vs. United States of America, stated, pages 16-17 of the slip opinion, which I hand up to your Honor:

"Since Rollerson's contempt conviction, a majority of

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the Supreme Court has indicated in *United States vs. Barnett* that the punishment which (65) may be imposed after a non-jury contempt conviction is limited to that provided for petit offenses."

Now, your Honor is familiar with the fact that four Justices of the Supreme Court—

The Court: I referred to that the other day.

Mr. Kossman: Yes.

The Court: And I am aware of the *Barnett* decision. I have studied and restudied the majority and minority opinions. I have studied Judge Wyatt's opinion in a recent case. I am aware of the views expressed by our Court of Appeals in the *Harris* case. And I believe that on the facts of this case the sentence that I have imposed complies with the spirit, the reasoning and the rationale of all of these cases.

Mr. Kossman: Well, the courts differ, that whatever term, that the sentence could not be more than six months, and if this conviction would be affirmed—

The Court: Every opinion, as Mr. Justice Frankfurter has so often stated, must be read in the factual context and procedural background of a case. You could find quotations to support almost any proposition, unless you read what the court says in the context, factually and procedurally, of the particular case.

(66)

I have attempted to comply fully with the teachings of the cases, and in all humility, a virtue to be exemplified by judges no less than lawyers, I have expressed my views in the opinion dictated on the record.

Mr. Kossman: The Court has stated that there are lawyer-like arguments, and we believe there are; therefore,

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there is a substantial question, and we would like bail fixed pending appeal.

The Court: An application is now being made for bail pending appeal. I shall hear the Government.

Mr. Lawler: Your Honor, the Government would oppose the application for bail pending appeal and ask that the defendant be remanded at this time.

The main basis for the Government's argument would be that your Honor has found that Mr. Pappadio in his refusal to testify has obstructed and hindered the grand jury in its investigation.

Your Honor has also included a clause in the sentence whereby if Mr. Pappadio were to answer these questions then the sentence might be reconsidered by your Honor.

Since we have this coercive effect being imposed by the sentence that your Honor has just imposed upon the (67) defendant, Andimo Pappadio, it is the position of the Government that this coercive effect should go into being as soon as possible. In other words, whatever coercive effect this sentence might have in convincing the witness to answer the questions as directed, that the interests of the grand jury and the public interest are best served by having this coercive effect take effect as soon as possible.

While Mr. Pappadio has a perfect right to appeal to the Court of Appeals, and if it is affirmed, to the Supreme Court, this grand jury investigation is continuing, and it is presently being hampered and obstructed by Mr. Pappadio's refusal.

I think, your Honor, that this sentence should be imposed to start immediately.

Mr. Kossman: May I answer that? If your Honor please, I think the facts of this case are not so. I mean

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Mr. Pappadio has answered numerous questions, forty questions or fifty questions, and it comes down to four questions. There is a substantial question of law involved. Your Honor indicated that there were two other—

The Court: I did not indicate that there was a substantial question involved.

(68)

Mr. Kossman: Well, you said lawyer-like questions—I am sorry; perhaps I read more into that—

The Court: You did.

Mr. Kossman: But it certainly is not frivolous, if the Court please.

Mr. Lawler: Your Honor—

The Court: Let Mr. Kossman get through, because he is making a record now. He knows that the precise word that he is using, the word “frivolous,” is a word of art in connection with applications for bail pending appeal, so we will let Mr. Kossman go ahead with his application.

Mr. Kossman: I don’t want your Honor to feel that I am talking just to make a record.

The Court: No; I have the highest respect for you, Mr. Kossman, and for your erudition—

Mr. Kossman: I appreciate that.

The Court: And for that reason I want to give you every opportunity to say whatever you have to say.

Mr. Kossman: I understand that there were two previous witnesses who refused to testify, who did not answer a single question, and I think bail was allowed. I know about the last one, the one that is up on appeal, I think it is Judge Wyatt—what is the name of that?

(69)

Mr. Lawler: The Castaldi case, your Honor—

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Mr. Kossman: The Castaldi case.

Mr. Lawler: In the second case, the Shillitani case, the witness was remanded by Judge MacMahon, and thereafter bail pending appeal was twice denied by the Circuit Court and eventually denied by the Supreme Court of the United States.

Mr. Kossman: But he is out.

Mr. Lawler: No, he is presently still in jail.

The Court: The Court of Appeals, as I recall, granted bail in one situation and denied bail in another.

Mr. Lawler: That is correct.

The Court: Mr. Lawler, what, so far as you can ascertain, are the distinguishing circumstances to explain the denial of bail in one instance and the granting of bail in the other?

Mr. Lawler: Your Honor, in the Castaldi case the bail was granted in the District Court by Judge Wyatt. At the time that we argued the question of bail apparently Judge Wyatt was of the opinion originally that Castaldi was entitled to bail as of right. We argued that it was discretionary with the judge, and I believe Judge Wyatt eventually agreed with us, but set bail in the amount, I think, of \$50,000.

(70)

The second time Judge MacMahon, being completely within the discretion of the trial court, remanded, and the Circuit Court stated on two separate occasions that they would not interfere with that judgment, and the Supreme Court stated that they would not interference with the judgment of the Circuit Court.

Mr. Kossman: May I say something, your Honor? In the case where bail was denied, the individual was on parole,

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I have been advised, and was remanded for violation of parole.

Mr. Lawler: That is not correct.

Mr. Kossman: Was he on parole?

Mr. Lawler: He was on parole; he was not remanded for violation of parole.

Mr. Kossman: He was on parole?

Mr. Lawler: Yes.

Mr. Kossman: Now here we have an individual who is out on bail on a narcotic charge since 1958. He has faithfully come here every time he was subpoenaed in the last six months or seven months.

Of course, as we have asked, we would like to have a trial on that 1958 thing, but of course—

The Court: You are now getting away from—

Mr. Kossman: But he is not an individual who (71) might run away. That problem does not exist. He is a business man.

The Court: Does he have a record?

Mr. Kossman: I beg your pardon?

The Court: Does he have a record?

Mr. oKssman: I don't believe he has, except for one conviction for which he received a pardon thirty years ago.

Mr. Lawler: He has a narcotics conviction, your Honor, for which he did receive a pardon.

Mr. Kossman: Thirty years ago, when he was, I think, eighteen years old or nineteen years old. So, therefore, in law he has no record. He is a businessman; he employs people. And as I say, if your Honor please, this case—and I know that comparisons are traditionally invidious—this case, compared to the one where bail was granted, where the individual refused to answer every question, "Are you

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in narcotics, and this and that." Here is an individual who has answered many, many questions.

So I think, under those circumstances, he stands in a better position, or should stand in a better position, even as far as the Government is concerned.

Mr. Lawler: Your Honor, as I stated, we are primarily (72) interested in obtaining testimony. I think it is fair to say that while the defendant Pappadio is not confined, which is the coercive effect, we are not going to receive the answers, and the grand jury is not going to receive the answers to these questions.

Mr. Kossman: Well, your Honor—

Mr. Lawler: I might also say that the life of this grand jury only extends six months from this past September. They are well within their second year and the life of the grand jury—

The Court: Mr. Lawler, the purpose of bail is limited to assurance of the appearance of the witness in a proceeding. Bail may not be used for collateral purposes, such as punishment or pressure, and to that extent I am constrained to disagree with your contention.

Rule 46 of the Federal Rules of Criminal Procedure, (a) (2), provides:

"Bail may be allowed pending appeal or certiorari, unless it appears that the appeal is frivolous or taken for delay."

The question that I have to decide in connection with this application for bail, within the framework of this case, is whether it appears to me reasonably that the (73) appeal is frivolous or taken for delay.

I have studied the exhibits in this case very closely, and I

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am, of course, familiar with the proceedings had before Judge MacMahon and before me. I have listened very closely to the arguments of counsel, and it appears to me, and I so state on the record, that the appeal would be frivolous and would be taken for delay.

Under those circumstances, I shall deny the application for bail.

Mr. Edelbaum: Your Honor, would you consider paroling the defendant in my custody pending an application to the Circuit Court for bail to be made immediately?

The Court: When you say "immediately," you mean what?

Mr. Edelbaum: I will make the application today, as soon as the Circuit Court will hear me.

Mr. Lawler: Your Honor, we could not very well object to that.

The Court: What is that?

Mr. Lawler: We will consent to it, if the application is going to be made today.

The Court: If the application is made today I will release the witness in the custody of Mr. Kossman (74) and Mr. Edelbaum. If counsel should ascertain, after going up to the Clerk's office of the Court of Appeals, that such an application cannot be presented today, notwithstanding the exercise of due diligence by counsel, but can be held next week, I should like to be so advised, and I will then entertain a new application to determine whether or not the witness should be continued in the custody of counsel until such time as counsel can make the application to the Court of Appeals.

Mr. Lawler: Your Honor, when we use the term "application," are you speaking in terms of the argument today, because we had the situation once where the application

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was made and the hearing was set down or the argument was set down for a week later.

The Court: That is why my present decision relates only to today, and then in the light of whatever may eventuate, I will then review the situation and decide what to do then.

As the record stands now, Pappadio is released in the custody of Mr. Kossman and Mr. Edelbaum only for today, and at the expiration of today, meaning 4:00 p.m. today, he no longer will be in custody of counsel but will have to be taken into custody by the Marshal, provided no earlier application is made to me, in which case (75) redefine the terms of his custody and release.

Mr. Kossman: We are going to file a notice of appeal forthwith, and then we will make our application for bail, so there is no delay from now on to our filing the application.

The Court: I would direct counsel to return before me by one o'clock today in this room.

Mr. Kossman: Yes, your Honor.

The Court: To advise me what the status of the matter is in the Court of Appeals vis-a-vis the date of a hearing, etc.

I am now returning to the Clerk all of the exhibits in this matter.

Mr. Kossman, do you want Exhibit A?

Mr. Kossman: Well, I don't know what the procedure here is. When they ask a record to be printed, do we not print everything that is in the Clerk's office?

The Court: No, they don't print everything. I will return all exhibits to the Clerk, and then counsel may decide amongst themselves what they want to do, but until there is a contrary agreement by counsel, the Clerk is directed to retain custody of the exhibits. And that is particularly a practicable procedure because if the (76) matter is going to the Court of Appeals, the file here would have to be trans-

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mitted to the Court of Appeals, and it may be expedient to keep all the exhibits in one place.

Mr. Kossman: I will state definitely that I do not care to have Exhibit A returned.

The Court: Will counsel check the file with the Clerk to be sure that all the exhibits are here, because in many cases sometimes an exhibit goes astray, and then there is a very sharp controversy as to who had the exhibit the last time. So out of an abundance of caution I am directing counsel and the Clerk to check to see that all the exhibits involved in this proceeding are in the Clerk's custody.

Mr. Kossman: And, of course, what will be added will be your Honor's opinion and findings of fact when we go up.

The Court: Yes, naturally, that is part of the proceedings in the case.

I am also returning to the Clerk the stenographic transcript of the proceedings yesterday, which the Clerk will file as the record of yesterday's proceedings.

There are three typographical corrections on page 28, which I understand have been called to the attention of counsel.

(77)

The Court: The word "those" is changed to "these." The word "matters" is changed to "meetings." The word "discussed" is changed to "described."

Is that correct?

Mr. Kossman: That is correct.

The Court: And the official reporter is directed to make those corrections and initial the margin, so that the corrections have the official imprimatur of the official reporter.

I think that ties up the package.

Government's Exhibit 1

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

To Andimo Pappadio
121 Eva Drive, Lido Beach, New York

GREETING:

WE COMMAND YOU that all and singular business and excuses being laid aside, you and each of you appear and attend before the GRAND INQUEST of the body of the people of the United States of America for the Southern District of New York, at a District Court, to be held at Room 1401 in the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, in and for the said Southern District of New York, on the 14th day of February 1964, at 10:00 o'clock in the forenoon, to testify and give evidence in regard to an alleged violation of Section 371 of Title 18, United States Code on the part of the United States, and not to depart the Court without leave thereof, or of the United States Attorney.

And for failure to attend you will be deemed guilty of contempt of Court and liable to penalties of the law.

DATED: New York, N. Y. February 3, 1964

Government's Exhibit 1

JAMES E. VALECHE
Clerk.

ROBERT M. MORGENTHAU
United States Attorney for the
Southern District of New York.

Note: Report at Room 307. In order to secure your witness fees and mileage, it is necessary that you retain this Subpoena and present the same at the United States Attorney's Office, Room 413, upon each day on which you attend Court as a witness.

Assistant
WILLIAM M. TENDY

Room 307

Government's Exhibit 2**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK**

In Re**ANDIMO PAPPADIO**

ORDER

Robert M. Morgenthau, United States Attorney for the Southern District of New York, having on the 4th day of August, 1964 made an application for an order instructing Andimo Pappadio, a witness appearing before a Grand Jury for the Southern District of New York then inquiring into alleged violations of the Federal Narcotic Laws, in the Southern District of New York and elsewhere, to testify and produce books, papers and other evidence, pursuant to the provisions of Title 18, U.S.C., Section 1406, and said application having duly been heard before this Court on the 4th day of August, 1964.

Now, upon reading the affidavit of Robert M. Morgenthau, United States Attorney for the Southern District of New York, and having heard Robert M. Morgenthau, United States Attorney for the Southern District of New York by Andrew M. Lawler, Jr., Assistant United States Attorney, Of Counsel, in support of said application, and Andimo Pappadio having appeared in person before this Court, represented by his attorney, and it appearing as follows:

1. Andimo Pappadio did appear on the 14th day of February, on the 24th day of April and on the 8th day of May,

Government's Exhibit 2

1964, before a duly constituted Grand Jury of the Southern District of New York.

2. The said Grand Jury was then inquiring into alleged violations of the Federal Narcotics Laws in the Southern District of New York and elsewhere.

3. Andimo Pappadio refused to answer certain questions relating to matters under inquiry before said Grand Jury, on the ground that his answers might tend to incriminate him.

4. In the judgment of the United States Attorney the testimony of said witness concerning the aforementioned matters is necessary to the public interest.

5. Said application for an order instructing the witness to testify and produce evidence subject to the provisions of Title 18, U.S.C. Section 1406 was made with the approval of the Attorney General of the United States, which approval is annexed to the affidavit in support of the said application; it is

ORDERED, that Andimo Pappadio appear as a witness before the aforementioned Grand Jury on the 4th day of August 1964, at 3 P.M., and it is further

ORDERED, subject to the provisions of Title 18, U.S.C. Section 1406, that the said Andimo Pappadio be and is hereby instructed to answer the questions propounded to him before the Grand Jury which were read into the record before me on August 4, 1964 and to testify and produce books, papers and other evidence with respect to the matters under inquiry, and it is further

Government's Exhibit 2

ORDERED, that the papers herein shall be sealed subject to the further order of the United States District Court for the Southern District of New York, or any judge thereof.

Dated: New York, N. Y.
August 4, 1964

LLOYD F. MACMAHON
U.S.D.J.

Government's Exhibit 3**UNITED STATES DISTRICT COURT****SOUTHERN DISTRICT OF NEW YORK****AFFIDAVIT**

In Re**ANDIMO PAPPADIO**

STATE OF NEW YORK
COUNTY OF NEW YORK
SOUTHERN DISTRICT OF NEW YORK

} ss.:

ROBERT M. MORGENTHAU, being duly sworn deposes and states:

That he is the United States Attorney for the Southern District of New York and submits this affidavit in support of an application to have the Court instruct Andimo Pappadio to testify and produce books, papers or other evidence pursuant to the provisions of Title 18, United States Code, Section 1406.

1. Andimo Pappadio on February 14, 1964 did appear before a duly constituted Grand Jury for the Southern District of New York, which Grand Jury was then and there inquiring into alleged violations of the Federal Narcotic Laws, in the Southern District of New York and elsewhere. On that date Andimo Pappadio refused to answer certain questions on the ground that his answers might tend to incriminate him. A copy of the Grand Jury minutes is attached hereto.

Government's Exhibit 3

2. On April 24, 1964, Andimo Pappadio appeared before the same Grand Jury, and again refused to answer certain questions which were put to him concerning violations of Title 21, U.S.C. Sections 173 and 174. Andimo Pappadio refused to answer these questions on the ground that his answers might tend to incriminate him. A copy of the Grand Jury minutes is attached hereto.

3. On May 8, 1964, Andimo Pappadio again appeared before the same Grand Jury and again refused to answer questions asked of him concerning violations of Title 21, U.S.C. Sections 173 and 174. Pappadio refused to answer on the ground that his answers might tend to incriminate him. A copy of those Grand Jury minutes is also attached hereto.

4. In my judgment as the United States Attorney for the Southern District of New York, the testimony of Andimo Pappadio is necessary and material to the investigation now being conducted by the Grand Jury with respect to the alleged narcotic violations. It is further my judgment that the testimony of Andimo Pappadio concerning the matters under inquiry and his responses to the above questions are necessary to the public interest of the United States.

5. This application is made in good faith and with the approval of Robert F. Kennedy, Attorney General of the United States. A letter from Mr. Kennedy, dated July 24, 1964 expressing such approval, is attached hereto and made a part hereof.

Government's Exhibit 3

6. Because the questions herein cover facts about persons not presently before the Court and because the nature and content of the proceedings before this Grand Jury should be kept confidential, subject to the objection of any person aggrieved thereby, it is respectfully requested that this application be sealed subject to further order of the Court or any Judge thereof.

WHEREFORE, the deponent respectfully requests the Court to order Andimo Pappadio to answer the foregoing questions or any other that may be put to him and to testify and produce evidence relating to the matters under inquiry pursuant to the provisions of Title 18, United States Code, Section 1406.

ROBERT M. MORGENTHAU
United States Attorney

Sworn to before me this
31 day of July, 1964.

JACK W. BALLEEN
Notary Public, State of New York
No. 41-48400, Queens County
Term Expires March 30, 1966

Government's Exhibit 3

[LETTER ANNEXED TO FOREGOING AFFIDAVIT]

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

July 24 1964

Mr. Robert M. Morgenthau
United States Attorney
New York, New York

Dear Mr. Morgenthau:

It is my understanding that you are presently conducting an investigation into the alleged involvement of associates of Thomas Luchese in violations relating to narcotics as set forth in Title 18, Section 1406, United States Code. It is further my understanding that Andimo Pappadio has information which would be necessary to the successful completion of that investigation; that it is your intention to recall him to testify before a grand jury inquiring into this matter; that Pappadio is expected to refuse to testify on the ground of the privilege against self-incrimination afforded him by the Fifth Amendment to the United States Constitution.

You have advised me that it is your judgment that the testimony of Andimo Pappadio is necessary to the public interest. With that judgment I am in accord. Should this witness claim said privilege against self-incrimination, therefore, you are authorized to make application to the United States District Court for the Southern District of New York for an order instructing the witness to testify and produce evidence pursuant to the provisions of Title 18, United States Code, Section 1406.

Sincerely,

R. F. KENNEDY
Attorney General

Government's Exhibit 4

February 14, 1964

Sep. Spl. Re: John Doe

Foll SA Mr. Tendy (and Mr. Lawler)

Andino T. Pappadio

ANDINO T. PAPPADIO, called as a witness, and having been duly sworn by the Foreman of the Grand Jury, testified as follows:

By Mr. Tendy:

Q. Sit down and face the jury, please. Would you state your name for the Grand Jury, please. A. Andino Pappadio.

Q. Mr. Pappadio, will you turn around and face the Grand Jury. If you like, you can smoke. A. Thank you.

Q. Would you spell both names. A. A-n-d-i-n-o P-a-p-p-a-d-i-o.

Q. Do you have a middle name or middle initial? A. T.

Q. What does the T stand for? A. Tom.

Q. Mr. Pappadio, where do you live? A. I refuse to answer on the grounds it may tend to incriminate me.

Q. When did you get back from Florida, yesterday or the day before? A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Incidentally, before you came in here this morning you spoke with your attorney? A. Yes, sir.

Q. Would you give us his name, please. A. Lauritano.

Q. L-a-u-r-i-t-a-n-o. His first name? A. Amedeo.

Q. Do you know his business address, his office address? A. 45 Seventh Avenue.

Government's Exhibit 4

Q. Do you happen to know his telephone number? A. No. I don't remember.

Q. O.K. Did you consult with your attorney this morning before you came to this Grand Jury room, and if you did—

A. Yes.

Q. —and if you did, did he advise you of your constitutional rights? A. Yes.

Q. There is no need for me to go into that then, I assume. A. That's right.

Q. O.K. Now, I will inform you that either yesterday or the day before, I think it was the day before yesterday, your attorney came to my office and told me that you had gone to Florida and requested an adjournment of your appearance here today. Now, in view of that information, I ask you again, have you gone to Florida in the last few days? A. I refuse to answer on the grounds that it may tend to incriminate me.

Q. I don't think you got that tan up here in New York this time of the year. Mr. Pappadio are you employed? A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Are you a citizen of the United States? A. Yes, sir.

Q. Are you a naturalized citizen or were you born here? A. I was born here.

Q. How old are you? A. I refuse to answer on the grounds it may intend to incriminate me.

Q. What connection, if any, do you have with Temple Fashions? A. I refuse to answer on the grounds it may intend to incriminate me.

Q. How about the Star Button Company? A. I refuse to answer on the grounds it may intend to incriminate me.

Q. Did you file an income tax return for 1962? A. I refuse to answer on the grounds it may intend to incriminate myself.

Government's Exhibit 4

Q. What do you know about Sherwood Fashions, Inc.? A. I refuse to answer on the grounds it may intend to incriminate me.

Q. Isn't it a fact that Sherwood Fashions is operated or owned by a person named Thomas Luccese? A. I refuse to answer on the grounds it may intend to incriminate me.

Q. Is it your testimony that Thomas Luccese does not operate that company? A. I refuse to answer on the grounds it may intend to incriminate me.

Q. What is your connection, if any, with Anna Lynn, L-y-n-n, Sportwear Corporation, Inc.? A. I refuse to answer on the grounds it may intend to incriminate me.

Q. How well do you know a person named Harry Weinberg? A. I refuse to answer on the grounds it may intend to incriminate me.

Q. How long have you known John Ormento? A. I refuse to answer on the grounds it may intend to incriminate me.

Q. How long have you known Salvatore Santorro? A. I refuse to answer on the grounds it may intend to incriminate me.

Q. Aren't you also known, at least with your friends, by the name, Tommy Pats? A. I refuse to answer on the grounds it may intend to incriminate me.

Q. Now, Mr. Pappadio, I am going to say something to you, then I will ask you a question. I want you to listen. Don't answer the question until you have a chance to go out and talk to your lawyer. There are certain areas that you can be questioned on and if you refuse to answer questions in those areas the Government can grant you immunity from prosecution, so that your answer cannot incriminate you. That goes for either state or federal court, any court in the United States. Do you understand what I have said? A. I didn't understand.

Government's Exhibit 4

Q. I will go through it again. There are certain areas that I can question you about and if you refuse to answer my questions the Government can grant you immunity from prosecution. For example, if you refuse to answer because you are afraid to answer because your answer might incriminate you, the Government can grant you immunity from prosecution. Now, if you are granted such immunity and if you still refuse to answer questions, you can be held in contempt of court and you can go to jail. You understand that? I am advising you of this. You understand what I have said? A. Yes, I understand.

Q. All right. Now, my question, before you answer it I want you to talk to your attorney. If you are granted such immunity will you still refuse to answer questions? Do you understand the question? A. When I'm granted the immunity I will decide if I should answer or not.

Q. O.K.

Mr. Tendy: Mr. Foreman, would you direct the witness to return on March 6, at 10:30 in the morning.

Foreman: You are directed to return here Friday, March 6, at 10:30 a.m.

Witness: Thank you.

Mr. Tendy: You are now excused.

Witness: Thank you.

(Witness leaves room.)

Government's Exhibit 5

April 24, 1964.

Sept. Spec. Re: John Doe.

Mr. Tendy; Mr. Lawler.

Witness: Andimo Thomas Pappadio

ANDIMO THOMAS PAPPADIO, having been duly sworn by the Foreman, testified as follows:

By Mr. Tendy:

Q. Your name is Andimo Pappadio, is that correct? A. Yes, sir.

Q. And is that spelled A-n-d-i-m-o—first name? A. P-a-p-p-a-d-i-o.

Q. Middle initial is "T", I think,—is that correct? A. Yes, sir.

Q. And the "T" stands for Thomas, is that correct? A. Yes, sir.

Q. Now, you're represented by an attorney, Mr. Pappadio? A. Yes, sir.

Q. What's his name? A. Lauritano.

Q. What's his first name, again? A. Amadeo Lauritano.

Q. Amadeo, I think it is? A. That's Amadeo. (spells)

Q. What's his office address? Do you know, offhand? A. 450 7th Avenue.

Q. Do you know what his office telephone number is? A. No.

Q. Did you consult with Mr. Lauritano before you came in here this morning? A. I don't get it. Do you mean today, yesterday, two weeks ago, five weeks ago—?

Government's Exhibit 5

Q. Let me rephrase it: did you consult with Mr. Lauritano concerning this Grand Jury proceeding at any time?

A. Yes.

Q. Has he advised you of your constitutional rights?

A. Yes, sir.

Q. Where do you live, Mr. Pappadio? A. 121 Eva Drive, Lido Beach, New York.

Q. Would you turn round and face the Grand Jury, please? Is that a private home, sir? A. Yes, sir.

Q. How long have you been living there? A. I refuse to answer.

Q. Do you own the home? A. I refuse to answer.

Q. Why? A. On the grounds that it may intend to incriminate me.

Q. What do you do for a living, Mr. Pappadio? A. I refuse to answer on the grounds that the answer to your questions may tend to incriminate me, in violation of the Fifth Amendment. I also refuse to answer because it violates my rights under the First Amendment.

Q. Mr. Pappadio,—sir, so that you'll have a better appreciation of the purpose of this Grand Jury proceeding, I want to advise you that there's been testimony before a Senate committee, and statements have been made to federal law enforcement agencies that a person named Thomas Lucchese is at the head of a group of people that are engaged in a number of illegal activities. It's been alleged that one of these illegal activities is the illicit narcotics traffic. It's also been alleged, sir, that you are a member of this particular group. Now, what we're attempting to do is find out whether or not these allegations are true or false. A. I refuse to answer on the same grounds, that I just repeated before.

Government's Exhibit 5

Q. Do you know Thomas Lucchese? A. I refuse to answer on the same principal.

Q. Did you ever hear of him? A. I refuse to answer on the same grounds.

Q. What do you do for a living, Mr. Pappadio? A. I refuse to answer on the grounds that it may tend to incriminate me.

Q. Do you have any legitimate employment? A. I refuse to answer on the grounds it may tend to incriminate me.

Q. Isn't it a fact that you and Lucchese are in business? A. I refuse to answer on the grounds that it may tend to incriminate me.

Q. Do you know Lucchese's brother, Joseph Lucchese? A. Refuse to answer.

Q. Do you know a person named John Ormento? A. I refuse to answer.

Q. Do you know a person named Salvatore Santoro? A. I refuse to answer on the ground that it may tend to incriminate me.

Q. Do you know a person named James Plumeri? A. I refuse to answer.

Q. All of these people, incidentally, are alleged to be members of this so-called group. Is this true? A. I refuse to answer.

Q. Are you married? A. I refuse to answer.

Q. Do you have any children? A. I refuse to answer.

Q. Do you know of anybody who's engaged in the illicit narcotics traffic? A. I refuse to answer.

Q. Are you in it? A. I refuse to answer.

Q. If you did know of anybody who was engaged in that traffic, would you report it to the proper law enforcement agency? A. I refuse to answer, Mr. Tendy.

Government's Exhibit 5

Q. When you refuse to tell us whether or not you're engaged in the illicit narcotics traffic, are you suggesting to us that you are in fact in it? A. I refuse to answer, Mr. Tendy.

Q. Have you ever been in the illicit narcotics traffic? A. I refuse to answer, Mr. Tendy.

Q. If you have a source of income, Mr. Pappadio, is it derived from any legitimate business? A. I refuse to answer, Mr. Tendy.

Q. How well do you know Salvatore Lo Proto? A. I refuse to answer, Mr. Tendy.

Q. Is there any question that I could put to you this morning that you would answer? A. I refuse to answer.

Mr. Tendy: Mr. Foreman, May 8th?

Foreman: You're directed to return May 8th, at ten o'clock, in this room.

Witness: Thank you.

(Witness leaves room.)

Government's Exhibit 6

May 8, 1964

Sep. Spl. Re: John Doe

(fr. SA.) Mr. Tendy (Mr. Lawler)

Andimo Pappadio

ANDIMO PAPPADIO, called as a witness and having been duly sworn by the Foreman of the Grand Jury, testified as follows:

Mr. Tendy: This is Andimo Pappadio (spells).

Q. Mr. Pappadio, I want to continue the questioning that we got involved in last Tuesday before the Grand Jury. At the narcotics trial of Vito Genovese there was testimony that you attended a meeting at the home of Rocco Masse and Westmore Priete (phonetic) in the Bronx. Did you attend this meeting? A. I refuse to answer on the grounds that it may tend to incriminate me on the Fifth Amendment and on the First Amendment.

Q. Who did you go to the meeting with? A. I refuse to answer on the grounds it may intend to incriminate me on the Fifth Amendment and First Amendment.

Q. Who asked you to attend? A. I would like to give the same answer I gave just now.

Q. Who was present at the meeting? A. I refuse to answer on the same grounds.

Q. What was discussed? A. I refuse to answer on the same grounds, the Fifth and the First.

Q. Isn't it a fact that the distribution of narcotics in the New York area was discussed to some extent? A. I refuse to answer on the grounds of the Fifth and the First.

Government's Exhibit 6

Q. Who called the meeting? A. I refuse to answer on the grounds of the Fifth and the First.

Q. What part did you take in the discussion? A. I refuse to answer on the Fifth and the First.

Q. Who played the major part in this discussion? A. I refuse to answer on the same grounds.

Q. What orders were made at this meeting concerning narcotics? A. I refuse to answer on the same grounds.

Q. What discussion was there about the sources of supply or future distribution or narcotics? A. I refuse to answer on the same grounds.

Q. Who was putting up the money to furnish the supply of narcotics? A. I refuse to answer on the same grounds.

Q. How was the expense to be applied among the members? A. I refuse to answer on the same grounds.

Q. A person named Rocco Mazzie was indicted along with Genovese for the sale and distribution of narcotics. How long have you know Mazzie? A. I refuse to answer on the same grounds.

Q. When was the first time you met him? A. I refuse to answer on the same grounds.

Q. I told you once before, it has been alleged that you are a member of a group of people which is headed up by Thomas Lucchese. It has been alleged that this group traffics in narcotics illegally. If this is true, how does this group bring narcotics into the country? A. I refuse to answer on the Fifth and the First.

Q. Have you taken any trips to Europe or any place else outside of the United States in the past ten years? A. I refuse to answer on the Fifth and the First.

Q. Did you meet anybody on these trips? A. I refuse to answer on the Fifth and the First.

Government's Exhibit 6

Q. Did you have any dealings with anyone in these trips and, if so, what were they? A. I refuse to answer on the Fifth and the First.

Q. Did you arrange to have anybody bring any narcotics into the United States on any of these trips? A. I refuse to answer on the Fifth and the First.

Q. Did you ever have any conversations with Thomas Lucchese concerning narcotics? A. I refuse to answer on the Fifth and the First.

Q. How well have you know Salvatore Lo Proto—how well do you know him?—I should say. A. I refuse to answer on the Fifth Amendment and the First Amendment.

Q. Where is he now? A. I refuse to answer on the Fifth Amendment and the First Amendment.

Q. Do you know where he is now, Mr. Pappadio? A. I refuse to answer on the Fifth Amendment and the First Amendment.

Q. Have you ever been in any narcotics traffic with him? A. I refuse to answer on the Fifth and the First.

Q. By the way, who first introduced you to Rocco Mazzie? A. I refuse to answer on the Fifth and the First Amendments.

Q. Will you tell us the circumstances of your first meeting with him. A. I refuse to answer on the Fifth and the First Amendments.

Q. It has been alleged that you know John Ormento. How long have you know him? A. I refuse to answer on the Fifth and the First Amendments.

Q. There is also testimony to the effect that he was present at the meeting in Mazzie's house. Is this true? A. I refuse to answer on the Fifth and the First Amendments.

Q. Ormento has been convicted of violating the Federal

Government's Exhibit 6

narcotics laws. Did you ever have any dealings with him in narcotics? A. I refuse to answer on the First and the Fifth Amendments.

Q. Did you ever have any discussion with John Ormento about narcotics? A. I refuse to answer on the Fifth and the First Amendments.

Q. When did you have this discussion and what was said? A. I refuse to answer on the Fifth and the First Amendments.

Q. Who did Ormento deal with in narcotics? A. I refuse to answer on the Fifth and the First Amendments.

Q. In the 1930's, Pappadio, you pleaded guilty to violating the Federal narcotics laws. At a subsequent date you stated that you plead guilty because your lawyer advised you; that you were innocent. You were saying you gave somebody a package, you didn't really know what you were doing. Now, who did you get the package from? A. I refuse to answer on the Fifth and the First Amendments.

Q. I realize that you were a young man in those days. It's quite possible you didn't know that you were doing it at all. Subsequently, as a matter of fact, so as to keep this thing in perspective, you did receive a presidential pardon. Isn't that a fact? A. I refuse to answer on the grounds of the Fifth and the First.

Q. This is a matter of record, Mr. Pappadio. I want to put the situation in proper perspective before the Grand Jury. This is a matter of record: Did you get a presidential pardon? A. I refuse to answer on the grounds of the Fifth and the First.

Q. Well, if you are innocent, as you said, Mr. Pappadio, then you should have no objection to telling us exactly what happened on that occasion. A. I refuse to answer on the same grounds of the Fifth and the First Amendments.

Government's Exhibit 6

Q. Are you saying, in substance, that the presidential pardon which you received was obtained fraudulently? A. I refuse to answer on the grounds of the Fifth and the First Amendments.

Mr. Tandy: Mr. Foreman, next Friday, please.

Foreman: You are excused in order to reappear here next Friday, May 15, at 10:00 a.m.

Witness: Thank you.

(Witness leaves room.)

Government's Exhibit 7

August 4, 1964

Re: Andimo Pappadio

Sept. Spec. Messrs. Lawler, McEvoy

Grand Jury in Court Session
before Judge MacMahon, USDJ

Appearances:

ANDREW M. LAWLER, JR.

Assistant United States Attorney

ANDREW T. McEVoy, JR.

Assistant United States Attorney

ANDIMO PAPPADIO

Witness

Grand Jury Reporter:
E. J. Cordes

Mr. Lawler: This is an application to grant the witness immunity. I notice not only is the witness, Pappadio, here, but also his attorney is still present, Mr. Lauritano.

Judge MacMahon: Well, both the marshal and his attorney should leave the room. The witness will remain. Let the record reflect no one is here except the witness, the Grand Jury, the Court and the Assistant United States Attorney.

Mr. Lawler: Your Honor, this is an application by the Government, under the provisions of Title 18, Section 1406, to grant the witness, Andimo Pappadio, immunity. At this time I'd hand up to the Court an affidavit of Robert M. Morgenthau, United States Attorney, which states that a Grand Jury investigation is being conducted, that this

Government's Exhibit 7

Grand Jury is investigating violations of the Narcotics Act, that in his opinion the testimony of Andimo Pappadio is essential to the public interest and that he requests that Andimo Pappadio be ordered by the Court to answer certain questions. Attached thereto is a letter of the Attorney General, Robert Kennedy, stating his approval of this application. Also attached thereto is transcript of three previous appearances by the witness, Andimo Pappadio, before this Grand Jury. Those appearances were on February 14, 1964; April 24, 1964; and May 8, 1964. On each of these occasions, with the exception of certain limited questions concerning his residence, Andimo Pappadio refused to answer any questions on the grounds that his answers might tend to incriminate him. The questions which the Government would request Your Honor order the witness to answer are essentially the same questions which were previously asked. If Your Honor cares for me to go into the specific questions after you've read the affidavit, I will.

Judge MacMahon: Do you have the questions?

Mr. Lawler: I have the questions checked off. Would you like me to read them into the record?

Judge MacMahon: Read them into the record.

Mr. Lawler: Would Your Honor care to follow the February 14 appearance which these questions are taken from:

"Mr. Pappadio, where do you live?"

"When did you get back from Florida, yesterday or the day before?"

"Now, I'll inform you that either yesterday or—"—I withdraw that; I'll not ask the Court to direct on that.

"How old are you?"

"What connection, if any, do you have with Temple Fashions?"

Government's Exhibit 7

"How about the Star Button Company?"

"Did you file an income tax return for 1962?"

"What do you know about Sherwood Fashions, Inc.?"

"Isn't it a fact that Sherwood Fashions is operated or owned by a person named Thomas Lucchese?"

"Is it your testimony that Thomas Lucchese does not operate that company?"

"What is your connection, if any, with Anna Lynn Sportswear Corporation?"

"How well do you know a person named Harry Weinberg?"

"How long have you known John Ormento?"

"How long have you known Salvatore Santorro?"

"Aren't you also known by the name, Tommy Pats?"

"How long have you been living at 121 Eva Drive, Lido Beach?"

"Do you own the home?"

"What do you do for a living, Mr. Pappadio?"

"So that you'll have a better appreciation of the purpose of this Grand Jury proceeding, I want to advise you that there's been testimony before a Senate committee and statements have been made to federal law enforcement agencies that a person named Thomas Lucchese is at the head of a group of people that are engaged in a number of illegal activities. It's been alleged that one of these illegal activities is the illicit narcotics traffic. It's also been alleged, sir, that you are a member of this particular group. Now, what we're attempting to do is find out whether or not these allegations are true or false. Are these allegations true?"

"Do you know Thomas Lucchese?"

"Did you ever hear of him?"

"Do you have any legitimate employment?"

Government's Exhibit 7

"Isn't it a fact that you and Lucchese are in business?"

"Do you know Lucchese's brother, Joseph Lucchese?"

"Do you know a person named John Ormento?"

"Do you know a person named Salvatore Santoro?"

"Do you know a person named James Plumeri?"

"All of these people, incidentally, are alleged to be members of this so-called group. Is this true?"

"Are you married?"

"Do you have any children?"

"Do you know of anybody who's engaged in the illicit narcotics traffic?"

"Are you in it?"

"Have you ever been in the illicit narcotics traffic?"

"If you have a source of income, Mr. Pappadio, is it derived from any legitimate business?"

"How well do you know Salvatore Lo Proto?"

"At the narcotics trial of Vito Genovese there was testimony that you attended a meeting at the home of Rocco Mazzie. Did you attend this meeting?"

"Who did you go to the meeting with?"

"Who asked you to attend?"

"Who was present at the meeting?"

"What was discussed?"

"Isn't it a fact that the distribution of narcotics in the New York area was discussed to some extent?"

"Who called the meeting?"

"What part did you take in the discussion?"

"Who played the major part in this discussion?"

"What orders were made at this meeting concerning narcotics?"

"What discussion was there about the sources of supply or future distribution of narcotics?"

Government's Exhibit 7

"Who was putting up the money to furnish the supply of narcotics?"

"How was the expense to be applied among the members?"

"A person named Rocco Mazzie was indicted along with Genovese for the sale and distribution of narcotics. How long have you known Mazzie?"

"When was the first time you met him?"

"I told you once before—it has been alleged that you are a member of a group of people which is headed by Thomas Lucchese. It has been alleged that this group traffics in narcotics illegally. If this is true, how does this group bring narcotics into the country?"

"Have you taken any trips to Europe or any place else outside of the United States in the past ten years?"

"Did you meet anyone on these trips?"

"Did you have any dealings with anybody on these trips and, if so, who were they?"

"Did you arrange to have anybody bring any narcotics into the United States on any of these trips?"

"Did you ever have any conversations with Thomas Lucchese concerning narcotics?"

"How well do you know Salvatore Lo Proto?"

"Where is he now?"

"Do you know where he is now, Mr. Pappadio?"

"Have you ever been in any narcotics traffic with him?"

"By the way, who first introduced you to Rocco Mazzie?"

"Will you tell us the circumstances of your first meeting with him?"

"It is alleged that you know John Ormento. How long have you known him?"

"There is also testimony to the effect that he was present at the meeting in Mazzie's house. Is this true?"

Government's Exhibit 7

"Ormento has been convicted of violating the federal narcotics law. Did you ever have any dealings with him in narcotics?"

"Did you ever have any discussion with John Ormento about narcotics?"

"When did you have this discussion and what was said?"

"Who did Ormento deal with in narcotics?"

"In the 1930's, Pappadio, you pleaded guilty to violating the federal narcotics laws. At a subsequent date you stated that you pled guilty because your lawyer advised you to do so, but you were innocent. You were saying you gave somebody a package; you didn't really know what you were doing. Now, who did you get that package from?"

"As a matter of fact, you received a presidential pardon. I want to put the situation in its proper perspective before the Grand Jury. This is a matter of record. Did you get a presidential pardon?"

"Well, if you were innocent, as you said, Mr. Pappadio, then you should have no objection to telling us exactly what happened on that occasion."

"Are you saying, in substance, that the presidential pardon which you received was obtained fraudulently?"

Those are the questions which I would ask Your Honor to instruct the witness to answer.

Judge MacMahon: Let the record reflect that the witness, Andimo Pappadio, was present when the Assistant United States Attorney read the questions into the record. Would you come forward, please, Mr. Pappadio. Did you hear the questions as they were read into the record just now?

Witness: Yes sir.

Judge MacMahon: I want you to listen carefully to what I'm about to say. I find that the Grand Jury proceeding presently involved relates to investigations involving vio-

Government's Exhibit 7

lations of the federal narcotic law enumerated in Subsection 2, Title 18, Section 1406, United States Code. Two, the United States Attorney certifies with respect to such matters that it is necessary in the public interest that the testimony of the witness, Andimo Pappadio, be obtained in exchange for the grant of immunity. Three, the Attorney General has approved the application. Four, no constitutional or legal objection exists to the compulsion of the witness's testimony since full and absolute immunity with respect to matters on which he is compelled to testify will be granted. Pursuant to the terms of the statutes for his constitutional right against self-incrimination, in substitution therefor I want to apprise Mr. Pappadio of the following: once you have been granted immunity from prosecution under the Narcotic Control Act of 1956, this, alone, exposes you to a contempt adjudication case and penalties should you refuse to comply with the order of this Court directing you to testify before the Grand Jury. You are further advised that the grant of immunity under the Narcotic Control Act of 1956 extends immunity against state, as well as federal, prosecution for or on account of any transaction, matter or thing concerning which you are compelled to testify or to produce evidence after a grant of immunity has been made by the United States Attorney and that the testimony so compelled cannot be used as evidence in any criminal proceeding against you in either a federal or a state court, except that you will not be exempt from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion here. Therefore, if that's fully understood, I direct you, Andimo Pappadio, to return to the Grand Jury and answer each and every one of the questions which were read into this record in your presence this morning.

Government's Exhibit 7

Mr. Lawler: Your Honor, the Government has prepared a proposed order which we hand up to Your Honor at this time.

Judge MacMahon: When do you wish the witness to return before the Grand Jury?

Mr. Lawler: Your Honor, if I understood your order correctly before, concerning the witness, Shillitani, the Grand Jury will have to be here at three o'clock this afternoon, is that correct?

Judge MacMahon: Yes.

Mr. Lawler: Would you order the witness to be here?

Judge MacMahon: All right. I order you to be here at three o'clock this afternoon before the Grand Jury. What room?

Mr. Lawler: 1401.

Judge MacMahon: In 1401; and you are instructed by the Court to answer each and every question which was read into the record in your presence and in the Court's presence. Copy of the order, and I direct that the affidavit and minutes be sealed till a further order of this Court.

Mr. Lawler: We have an additional application that concerns an additional witness.

Judge MacMahon: All right.

(Mr. Pappadio leaves courtroom).

Government's Exhibit 8

August 4, 1964

Re: John Doe

Sept. Spec. Mr. Lawler

Andimo Pappadio

ANDIMO PAPPADIO, recalled as a witness, having been duly sworn by the Foreman, testified as follows:

By Mr. Lawler:

Q. Would you state your name, please. A. Andimo Pappadio.

Q. Mr. Pappadio, you were present this morning during a Grand Jury proceeding when the Government made application to have immunity granted to you and have you ordered to answer certain questions, were you not? You were in court this morning when this took place? A. Was I in court when this took place? Yes.

Q. You are aware of the fact that the Court has granted you full and complete immunity at this time. A. That's what I understand. I don't know what the—the whole law, but—

Q. You were there when the Judge said that. A. He said that, yes.

Q. And you were ordered to—instructed—to answer certain questions. A. Yes.

Q. I'm going to ask you those questions. Mr. Pappadio, where do you live? A. 121 Eva Drive, Lido Beach, New York.

Q. Mr. Pappadio, when did you last get back from Florida? A. I refuse to answer on the grounds that the

Government's Exhibit 8

answer to your question might tend to incriminate me in violation of the Fifth Amendment. I also refuse to answer because it violates my rights under the First Amendment.

Q. Mr. Pappadio, did you read that answer from a card?

A. Yes sir.

Q. Was that card prepared for you by somebody? A. I refuse to answer. On the same grounds.

Q. Did your attorney prepare that for you? A. I refuse to answer on the grounds that the answer to your question may tend to incriminate me in violation of the Fifth Amendment. I also refuse to answer because it violates my rights under the First Amendment.

Q. Mr. Pappadio, how old are you? A. Fifty.

Q. Mr. Pappadio, where were you born? A. New York City.

Q. What connection, if any, do you have with Temple Fashions? A. I refuse to answer on the grounds that the answer to your question might tend to incriminate me in violation of the Fifth Amendment. I also refuse to answer because it violates my rights under the First Amendment.

Q. Mr. Pappadio, would you give your date of birth. A. 2-2-14. February 2nd, 1914.

Q. Mr. Pappadio, what do you know about the Star Button Company? A. I refuse to answer on the grounds that the answer to your question might tend to incriminate me in violation of the Fifth Amendment. I also refuse to answer because it violates my rights under the First Amendment.

Q. Mr. Pappadio, if you'r going to refuse to answer on the same grounds, you can merely say, "On the same grounds." You can read it each time, but I think it suffices if it's going to be the same grounds. Did you file an income tax return for 1962? A. I refuse to answer—the same grounds.

Government's Exhibit 8

Q. What do you know about Sherwood Fashions, Inc.?
A. I refuse to answer on the same grounds, the same answer before.

Q. Isn't it a fact that Sherwood Fashions is operated or owned by a person named Thomas Lucchese? A. I refuse to answer—same grounds.

Q. Is it your testimony that Thomas Lucchese does not operate that company? A. I refuse to answer on the same grounds.

Q. What is your connection, if any, with Anna Lynn Sportswear Corporation, Inc.? A. I refuse to answer on the same grounds.

Q. How well do you know a person named Harry Weinberg? A. I refuse to answer on the same grounds.

Q. How long have you known John Ormento? A. I refuse to answer on the same grounds.

Q. How long have you known Salvatore Santoro? A. I refuse to answer on the same grounds.

Q. Aren't you also known, at least with your friends, by the name, Tommy Pats? A. I refuse to answer on the same grounds.

Q. How long have you been living at 121 Eva Drive, Lido Beach? A. I refuse to answer on the same grounds.

Q. Do you own the home? A. I refuse to answer on the same grounds.

Q. What do you do for a living, Mr. Pappadio? A. I refuse to answer on the same grounds.

Q. Mr. Pappadio, so that you'll have a better appreciation of the purpose of this Grand Jury proceeding, I want to advise you that there's been testimony before a Senate committee, and statements have been made to federal law enforcement agencies, that a person named Thomas Lucchese is at the head of a group of people that are engaged in a number of illegal activities. It's been alleged that one

Government's Exhibit 8

of these illegal activities is the illicit narcotics traffic. A. I refuse to answer.

Q. I've not asked you a question. It's also been alleged that you are a member of this particular group. What we're trying to do is find out whether these allegations are true or false. Are they true or false? A. I refuse to answer on the same grounds, the Fifth and the First.

Q. Do you know Thomas Lucchese? A. I refuse to answer on the same grounds, the Fifth Amendment and the First Amendment.

Q. Did you ever hear of him? A. I refuse to answer on the same grounds.

Q. Do you have any legitimate employment? A. I refuse to answer on the same grounds.

Q. Isn't it a fact that you and Lucchese are in business? A. I refuse to answer on the same grounds.

Q. Do you know Lucchese's brother, Joseph Lucchese? A. I refuse to answer on the same grounds.

Q. Do you know a person named John Ormento? A. I refuse to answer on the same grounds, the Fifth and the First.

Q. Do you know a person named Salvatore Santoro? A. I refuse to answer under the Fifth and First Amendments.

Q. Do you know a person named James Plumeri? A. I refuse to answer under the Fifth and First Amendments.

Q. All of these people, incidentally, are alleged to be members of this so-called group. Is this true? A.--

Q. Did you hear the question? I'll read it again. All of these people, incidentally, are alleged to be members of this so-called group. Is this true. A. I refuse to answer on the same grounds.

Q. Are you married? A. Yes, sir.

Q. Do you have any children? A. Yes sir.

Q. How many? A. One.

Government's Exhibit 8

Q. How old is that child? A. I refuse to answer on the same grounds.

Q. Do you know of anybody who is engaged in the illicit narcotics traffic? A. I refuse to answer on the same grounds.

Q. Are you in it? A. I refuse to answer on the same grounds.

Q. If you did know of anybody who was engaged in that traffic, would you report it to the proper law enforcement agency? A. I refuse to answer on the same grounds.

Q. When you refuse to tell us whether or not you're engaged in the illicit narcotics traffic, are you suggesting to us that you are, in fact, in it? A. I refuse to answer on the same grounds.

Q. Have you ever been in the illicit narcotics traffic? A. I refuse to answer on the same grounds.

Q. If you have a source of income, Mr. Pappadio, is it derived from any legitimate business? A. I refuse to answer on the same grounds.

Q. How well do you know Salvatore La Proto? A. I refuse to answer on the Fifth and First.

Q. Mr. Pappadio, at the narcotics trial of Vito Genovese there was testimony that you attended a meeting at the home of Rocco Mazzie. Did you attend this meeting? A. I refuse to answer on the same grounds, Fifth and First.

Q. Who asked you to attend? A. I refuse to answer under the Fifth and the First.

Q. Who was present at the meeting? A. I refuse to answer under the Fifth and the First.

Q. What was discussed? A. I refuse to answer under the Fifth and the First.

Q. Isn't it a fact that distribution of narcotics in the New York area was discussed to some extent? A. I refuse to answer under the Fifth and the First.

Government's Exhibit 8

Q. Who called the meeting? A. I refuse to answer on the same grounds.

Q. What part did you take in the discussion? A. I refuse to answer on the same grounds.

Q. Who played the major part in this discussion? A. I refuse to answer on the same grounds.

Q. What orders were made at this meeting concerning narcotics? A. I refuse to answer on the same grounds.

Q. What discussion was there about the sources of supply or future distribution of narcotics? A. I refuse to answer on the same grounds.

Q. Who was putting up the money to furnish the supply of narcotics? A. I refuse to answer on the same grounds, Fifth and First Amendments.

Q. How was the expense to be applied among the members? A. I refuse to answer, Fifth and First.

Q. A person named Rocco Muzzie was indicted along with Genovese for the sale and distribution of narcotics. How long have you known Mazzie? A. I refuse to answer on the same grounds.

Q. When was the first time you met him? A. I refuse to answer, Fifth and First.

Q. I told you once before, it has been alleged that you are a member of a group of people which is headed by Thomas Lucchese. It has been alleged that this group traffics narcotics illegally. If this is true, how does this group bring narcotics into the country? A. I refuse to answer under the Fifth and the First.

Q. Have you taken any trips to Europe or any place else outside the United States in the past ten years? A. I refuse to answer under the Fifth and the First.

Q. Did you meet anybody on these trips? A. I refuse to answer on the Fifth and First.

Government's Exhibit 8

Q. Did you have any dealings with anybody on these trips and, if so, who were they? A. I refuse to answer on the the Fifth and First.

Q. Did you arrange to have anybody bring any narcotics into the United States on any of these trips? A. I refuse to answer on the Fifth and First.

Q. Did you ever have any conversations with Thomas Lucchese concerning narcotics? A. I refuse to answer under the Fifth and First.

Q. How well have you known Salvatore Lo Proto? A. I refuse to answer under the Fifth and First.

Q. Where is he now? A. I refuse to answer on the Fifth and First.

Q. Do you know where he is now, Mr. Pappadio? A. I refuse to answer under the Fifth and the First.

Q. Have you ever been in any narcotics traffic with him? A. I refuse to answer on the Fifth and First.

Q. By the way, who first introduced you to Rocco Mazzie? A. I refuse to answer on the same grounds.

Q. Will you tell us the circumstances of your first meeting with him. A. I refuse to answer, Fifth and First.

Q. It has been alleged that you know John Ormento. How long have you known him? A. I refuse to answer, Fifth and First.

Q. There is also testimony to the effect that he was present at the meeting at Mazzie's house. Is this true? A. I refuse to answer under the Fifth and the First.

Q. Ormento has been convicted of violating the federal narcotics laws. Did you ever have any dealings with him in narcotics? A. I refuse to answer under the Fifth and First.

Q. Did you ever have any discussion with John Ormento about narcotics? A. I refuse to answer, Fifth and First.

Government's Exhibit 8

Q. When did you have this discussion and what was said?

A. I refuse to answer under the Fifth and First.

Q. Who did Ormento deal with in narcotics? A. I refuse to answer under the Fifth and First.

Q. In the 1930's Pappadio, you pleaded guilty to violating the federal narcotics law. At a subsequent date, you stated that you pleaded guilty because your lawyer advised you; that you were innocent; you were saying you gave somebody a package; you didn't really know what you were doing. Now, who did you get the package from? A. I refuse to answer under the Fifth and First.

Q. Now, you did receive a presidential pardon on that; that's a matter of record. I want to put the situation in proper perspective before the Grand Jury: did you get a presidential pardon? A. I refuse to answer under the Fifth and First.

Q. Well, if you are innocent, as you said, Mr. Pappadio, then you should have no objection to telling us exactly what happened on that occasion. A. I refuse to answer under the Fifth and First.

Q. Are you saying in substance that the presidential pardon which you received was obtained fraudulently? A. I refuse to answer under the Fifth and First.

Q. Mr. Pappadio, are you represented by an attorney? A. Not today.

Q. Was not Mr. Lauritano present with you earlier this morning? A. He was present. If I know what—what I was facing—and he spoke to me Friday, and I went down his office yesterday, and told me that somebody from the United States Attorney's office was in contact with him.

Q. Well, he has represented you on previous appearances before the Grand Jury? A. Up until—I don't know—some time in May or June, whenever—last time I was here.

Government's Exhibit 8

Q. You appeared in February, April and May. On each of those occasions Mr. Lauritano was with you? A. That's why I made up my mind I didn't need no more attorney. He was told to go home—I would come up here—told to go home.

Q. Mr. Lauritano was with you here this morning? A. He told me, "Let me come down with you." I said, "Let me get another attorney", I said, "what's the sense your coming down?" So we continued to talk, and wound up, I said, "All right; come on down." When I was faced in front of the judge, that's when I decided I should look around for another lawyer.

Q. Mr. Lauritano is not representing you any more? A. No.

Q. Do you have a particular attorney in mind? A. Well, I've got a few attorneys. I tried to reach Jack Kosman just now. I couldn't get him in the office.

Q. Is Mr. Kosman from Philadelphia? A. Philadelphia.

Q. Mr. Pappadio, I'm going to adjourn your next appearance from this Grand Jury, since you've stated you're going to obtain another attorney. But I'd advise you to consult as soon as possible with that attorney, so that on your next appearance, you're able to answer the question. A. I'll try my utmost.

Mr. Lawler: Mr. Foreman, would you direct the witness to reappear before this Grand Jury on August 19th at ten o'clock in the morning, in Room #1401?

Foreman: You're directed to return August 19th at ten o'clock, in Room #1401.

Witness: Thank you, thank you.

(Witness leaves room.)

Government's Exhibit 9

October 6, 1964

Sept. Spec. Re: John Doe

fol SA Mr. Lawler

Andimo Pappadio

ANDIMO PAPPADIO, called as a witness, and having been duly sworn by the Foreman of the Grand Jury, testified as follows:

By Mr. Lawler:

Q. Would you state your name, please. A. Andimo Pappadio (spelled.)

Q. Mr. Pappadio, if you recall, on August 4, 1964, you appeared in Room 318 of this Courthouse before Judge MacMahon at which time Judge MacMahon ordered you to answer certain questions after having explained to you that you had been granted immunity pursuant to the Narcotics Control Act. Do you remember that? A. I remember that.

Q. At this time, Mr. Pappadio, I intend to ask you those questions that Judge MacMahon instructed you to answer. A. I was called in, I had no attorney. I recall being called in but I don't understand everything you said.

Q. Mr. Pappadio, on your previous appearances before the Grand Jury were you not represented by a Mr. Lauritano? A. I said I was called without an attorney in the front of the court room.

Q. Will you answer the questions. On your previous appearances before the Grand Jury were you represented by Mr. Lauritano? A. I refuse to answer on the ground it may intend to incriminate me under the Fifth and the First.

Government's Exhibit 9

Q. Didn't you state on previous appearances before the Grand Jury that you were represented by Mr. Lauritano?

A. I refuse to answer under the First and Fifth Amendment.

Q. On your appearance on August 4th, was not Mr. Lauritano with you? A. I refuse to answer on the First and Fifth Amendment.

Q. At the time you were instructed to answer these questions and the immunity provisions were explained to you, was not Mr. Lauritano present with you before the court in Room 318? A. He was not.

Q. Was Mr. Lauritano present outside the court room? A. I don't know.

Q. Had you consulted with Mr. Lauritano that morning before coming before the Grand Jury? A. I refuse to answer under the First and Fifth Amendment.

Q. Mr. Pappadio, I intend to ask you the questions which Judge MacMahon instructed you to answer. Mr. Pappadio, where do you live? A. 121 Eva Drive, Lido Beach, New York.

Q. When did you get back from Florida, yesterday or the day before? A. I refuse to answer on the grounds it may intend to incriminate me under the First and Fifth Amendment.

Q. I'll withdraw that question. Mr. Pappadio, how old are you? A. Fifty years old.

Q. What connection, if any, do you have with Temple Fashions? A. I refuse to answer under the First and Fifth Amendment.

Q. Mr. Pappadio, what connection do you have with Star Button Company? A. I refuse to answer under the First and Fifth Amendment.

Q. Did you file an income tax return for 1962? A. I refuse to answer under the First and Fifth Amendment.

Government's Exhibit 9

Q. What do you know about Sherwood Fashions, Incorporated ? A. I refuse to answer under the First and Fifth Amendment.

Q. Isn't it a fact that Sherwood Fashions is operated or owned by a person named Thomas Luchese? A. I refuse to answer under the First and Fifth Amendment.

Q. Is it your testimony that Thomas Luchese does not operate that company? A. I refuse to answer under the First and Fifth Amendment.

Q. What is your connection, if any, with Anna Lynn Sportswear Corporation? A. I refuse to answer under the First and Fifth Amendment.

Q. How well do you know a person named Harry Weinberg? A. I refuse to answer under the First and Fifth Amendment.

Q. How long have you known John Ormento? A. I refuse to answer under the First and Fifth Amendment.

Q. How long have you known Salvatore Santoro? A. I refuse to answer under the First and Fifth Amendment.

Q. Are you also known by the name Tommy Paps? A. I refuse to answer under the First and Fifth Amendment.

Q. How long have you been living at 121 Eva Drive, Lido Beach? A. I refuse to answer under the First and Fifth Amendment.

Q. Do you own the home? A. I refuse to answer under the First and Fifth Amendment.

Q. What do you do for a living? A. I refuse to answer under the First and Fifth Amendment.

Q. So that you will have a better appreciation of the purpose of this Grand Jury proceeding, I want to advise you that there has been testimony before a Senate Committee and statements have been made to Federal law enforcement agencies that a person named Thomas Luchese is at the

Government's Exhibit 9

head of a group of people engaged in a number of illegal activities. It's been alleged that one of these illegal activities is the illicit narcotics traffic.

It has also been alleged that you are a member of this particular group. What we are attempting to do is to find out whether or not these allegations are true or false. Are these allegations true? A. I refuse to answer under the Fifth Amendment.

Q. Do you know Thomas Luchese? A. I refuse to answer under the First and Fifth Amendment.

Q. Did you ever hear of him? A. I refuse to answer under the First and Fifth Amendment.

Q. Do you have any legitimate employment? A. I refuse to answer under the First and Fifth Amendment.

Q. Isn't it a fact that you and Luchese are in business? A. I refuse to answer under the First and Fifth Amendment.

Q. Do you know Luchese's brother Joseph Luchese? A. I refuse to answer under the First and Fifth Amendment.

Q. Do you know a person named John Ormento? A. I refuse to answer under the First and Fifth Amendment.

Q. Do you know a person named Salvatore Santoro? A. I refuse to answer under the First and Fifth Amendment.

Q. Do you know a person named James Plumeri? A. I refuse to answer under the First and Fifth Amendment.

Q. All of these people, incidentally, are alleged to be members of this so-called group. Is this true? A. I refuse to answer under the First and Fifth Amendment.

Q. Are you married? A. I refuse to answer under the First and Fifth Amendment.

Q. Do you have any children? A. I refuse to answer under the First and Fifth Amendment.

Government's Exhibit 9

Q. Do you know of anybody who's engaged in the illicit narcotics traffic? A. I refuse to answer under the First and Fifth Amendment.

Q. Are you in it? A. I refuse to answer under the First and Fifth Amendment.

Q. Have you ever been in the illicit narcotics traffic? A. I refuse to answer under the First and Fifth Amendment.

Q. If you have a source of income, Mr. Pappadio, is it derived from any legitimate business? A. I refuse to answer under the First and Fifth Amendment.

Q. How well do you know Salvatore Lo Proto? A. I refuse to answer under the First and Fifth Amendment.

Q. At the narcotics trial of Vito Genovese there was testimony that you attended a meeting at the home of Rocco Mazzie. Did you attend this meeting? A. I refuse to answer under the First and Fifth Amendment.

Q. Who did you go to this meeting with? A. I refuse to answer under the First and Fifth Amendment.

Q. Who asked you to attend? A. I refuse to answer under the First and Fifth Amendment.

Q. Who was present at the meeting? A. I refuse to answer under the First and Fifth Amendment.

Q. What was discussed? A. I refuse to answer under the First and Fifth Amendment.

Q. Isn't it a fact that the distribution of narcotics in the New York area was discussed to some extent? A. I refuse to answer under the First and Fifth Amendment.

Q. Who called the meeting? A. I refuse to answer under the First and Fifth Amendment.

Q. What part did you take in the discussion? A. I refuse to answer under the First and Fifth Amendment.

Q. Who played the major part in this discussion? A. I refuse to answer under the First and Fifth Amendment.

Government's Exhibit 9

Q. What orders were made at this meeting concerning narcotics? A. I refuse to answer under the First and Fifth Amendment.

Q. What discussion was there about the sources of supply or future distribution of narcotics? A. I refuse to answer under the First and Fifth Amendment.

Q. Who was putting up the money to furnish the supply of narcotics? A. I refuse to answer under the First and Fifth Amendment.

Q. How was the expense to be applied among the members? A. I refuse to answer under the First and Fifth Amendment.

Q. A person named Rocco Mazzie was indicted along with Genovese for the sale and distribution of narcotics. How long have you known Mazzie? A. I refuse to answer under the First and Fifth Amendment.

Q. When was the first time you met him? A. I refuse to answer under the First and Fifth Amendment.

Q. I told you once before it has been alleged that you are a member of a group of people which is headed by Thomas Luchese. It's been alleged that this group traffics in narcotics illegally. If this is true, how does this group bring narcotics into this country? A. I refuse to answer under the First and Fifth Amendment.

Q. Have you taken any trips to Europe or any place outside the United States in the last ten— A. I refuse to—

Q. Will you wait until I finish the question. A. Excuse me.

Q. Go ahead. A. I refuse to answer under the First and Fifth Amendment.

Q. Did you meet anyone on these trips? A. I refuse to answer under the First and Fifth Amendment.

Government's Exhibit 9

Q. Did you have any dealings with anybody on these trips, and if so, who were they? A. I refuse to answer under the First and Fifth Amendment.

Q. Did you arrange to have anybody bring any narcotics into the United States on any of these trips? A. I refuse to answer under the First and Fifth Amendment.

Q. Did you ever have any conversations with Thomas Luchese concerning narcotics? A. I refuse to answer on the grounds of the First and Fifth Amendment.

Q. How well do you know Salvatore Lo Proto? A. I refuse to answer on the grounds it may intend to incriminate me, and the First and Fifth Amendment.

Q. Have you ever been in any narcotics traffic with him? A. I refuse to answer on the grounds it may intend to incriminate me, and First and Fifth.

Q. By the way, who first introduced you to Rocco Mazzie? A. I refuse to answer on the grounds it may intend to incriminate me, First and Fifth.

Q. Will you tell us the circumstances of your first meeting with him? A. I refuse to answer on the grounds it may intend to incriminate me, on the First and Fifth.

Q. It has been alleged that you know John Ormento. How long have you known him? A. I refuse to answer on the grounds it may intend to incriminate me under First and Fifth.

Q. There's also testimony to the effect that he was present at the meeting in Mazzie's house. Is this true? A. I refuse to answer on the grounds it may intend to incriminate me under First and Fifth.

Q. Ormento has been convicted of violating the narcotics laws. A. I refuse—

Q. Did you ever have any dealings with him in narcotics? A. I refuse to answer on the grounds it may incriminate me, First and Fifth.

Government's Exhibit 9

Q. Did you ever have any discussion with John Ormento about narcotics? A. I refuse to answer the whole thing, First and Fifth.

Q. Excuse me; when did you have this discussion and what was said? A. I refuse to answer on the grounds of the First and Fifth Amendment.

Q. Who did Ormento deal with in narcotics? A. I refuse to answer on the grounds it may intend to incriminate me under First and Fifth Amendment.

Q. In the 1930's you pleaded guilty to violating the Federal Narcotics law. On a subsequent date you stated that you pled guilty because your lawyer advised you to do so, but you were innocent. You were saying you gave somebody a package; you really didn't know what you were doing. Who did you get that package from? A. I refuse to answer on the grounds it may intend to incriminate me under the First and Fifth.

Q. As a matter of fact, you received a Presidential pardon. I want to put the situation in its proper perspective before the Grand Jury. This is a matter of record. Did you get a presidential pardon? A. I refuse to answer on the First and Fifth.

Q. If you were innocent as you said, Mr. Pappadio, then you should have no objection to telling us exactly what happened on that occasion. Are you saying in substance that the Presidential pardon which you received was obtained fraudulently? A. I refuse to answer on the grounds of the First and Fifth.

Q. Mr. Pappadio, are you represented by an attorney here this morning? A. Yes, sir.

Q. Will you tell us his name? A. Jack Kossman, Jacob Kossman.

Q. Is Mr. Kossman outside? A. Yes, sir.

Government's Exhibit 9

Q. Have you discussed this case with Mr. Kossman before coming here this morning? A. He's green about the whole thing.

Q. I just asked— A. You give me a copy—well, you just asked me, and you want me to stop and you want me to answer. Let me talk.

Q. Go ahead. A. You give me a copy of that. Let me talk it over with my attorney. Then I'll walk back in here.

Q. Have you discussed— A. You just keep going this way to me, you don't want me to talk.

Q. You can say anything you want. You can also answer my questions. Have you discussed this case with him? A. I told him that I was coming here. I didn't discuss this case. I'm just listening to it with two ears.

Q. Did he advise you of your constitutional rights? A. I refuse to answer on the grounds it may intend to incriminate me under the First and Fifth.

Q. Were you ordered in your appearance on August 4th before this Grand Jury to return on August 19th before this Grand Jury? A. I refuse to answer under the First and Fifth.

Q. You were not here August 19th without an attorney. A. I refuse to answer; it may intend to incriminate me under the First and Fifth.

Mr. Lawler: I have no further questions. Will you step outside, unless you have something you would like to say, go ahead.

The Witness: Just like to have a copy of that.

Mr. Lawler: Copy of what, the questions that you were ordered to answer?

The Witness: That I was ordered to answer.

Mr. Lawler: All right, will you step outside.

Witness leaves room.

Government's Exhibit 10

October 8, 1964

Re: Andimo Pappadio

Sept. Spec. Messrs. Lawler, Tendy

Grand Jury in Court Session
Before Judge Herlands, USDJ

Appearances:

WILLIAM M. TENDY,
Assistant United States Attorney

ANDREW M. LAWLER, JR.,
Assistant United States Attorney

JOHN E. SPRIZZO,
Assistant United States Attorney

ROBERT L. KING,
Assistant United States Attorney

EZRA H. FRIEDMAN,
Assistant United States Attorney

JACOB KOSSMAN,
Attorney for Mr. Pappadio

ANDIMO PAPPADIO,
Witness

Grand Jury Reporter:
E. J. Cordes

Judge Herlands: Do you have the appearances?

Reporter: Yes.

Mr. Lawler: May the record reflect that this is a closed session of the Grand Jury. The only people present are the Grand Jury, the Grand Jury reporter, and the Assistant

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United States Attorneys, whose names are John Sprizzo, Robert King, Ezra Friedman, and I am Andrew Lawler. Your Honor, the Grand Jury here seeks the assistance of the Court in connection with the matter involving Andimo Pappadio, a witness who has refused to answer questions which the Court had previously instructed him to answer. At this time I think the witness should be in the courtroom, and I might state that we have no objection if his attorney be in the court.

Judge Herlands: Yes, I think the witness and his attorney should come into the courtroom at this point.

(Witness Pappadio and Attorney Kossman enter.)

Judge Herlands: Mr. Pappadio, you may be seated; and, Mr. Kossman, will you give the reporter your full name and office address.

Mr. Kossman: Jacob Kossman (spells), 1325 Spruce Street, Philadelphia 7, Pa.

Judge Herlands: You may be seated, Mr. Kossman. You may proceed.

Mr. Lawler: I might briefly outline the background of this case. The witness, Pappadio, appeared on three occasions before this Grand Jury—on February 14, 1964; April 24, 1964; and May 8, 1964. On each of these occasions he refused to answer questions put to him on the grounds that his answers might tend to incriminate him. On August 4th, 1964, upon the application of the Government, on the affidavit of Mr. Morgenthau and the approval of the Attorney General, application was made pursuant to the provisions of Title 18, Section 1406, to have the witness directed to answer certain questions and to have him granted immunity pursuant to that section. On that occasion the witness was brought before Judge MacMahon. The Government made

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the application, the Judge found that all the provisions of that statute had been met, and he thereafter instructed the witness to answer certain questions.

(Mr. Tendy enters courtroom)

On two subsequent occasions, the afternoon of August 4th and October 5th of this week, the Witness was again brought before the Grand Jury. On these occasions he was asked the questions he was directed to answer, and he refused to answer these questions on the First and Fifth Amendments. At this time the Grand Jury seeks the assistance of the Court. What we would ask the Court to do is to once more instruct the witness that he has been granted immunity, that he must answer these questions and, if Your Honor so desires, to put these questions once again to the witness.

Judge Herlands: Mr. Kossman, that represents a chronology of the proceedings here. I'd be glad to hear you.

Mr. Kossman: I think the Government has fairly summarized it up to date, but there's this that I'd like to present to the Court at this particular posture. Now, I don't know whether I should do it before Your Honor reads the questions, since I haven't seen the questions that he has been directed and, therefore, I haven't had a chance to consult with him in terms of advice, specifically, but—may I approach?—but more important is this: I'd like to call Your Honor's attention to the fact that Mr. Pappadio is a defendant in a case where he was indicted, a narcotic case, C 156-157. On December 1st, 1958, the Government moved to sever—

Judge Herlands: '58?

Mr. Kossman: 1957. —moved to sever the defendant—Judge Bicks—and the motion was granted. Of course, I have a copy, a certified copy, and the Government knows it.

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I put it to Your Honor this way, that it creates a situation where defendant is under indictment—and I might say that—and he hasn't been tried—and I might say this, and I don't say it facetiously, that he's prepared to go to trial tomorrow—since 1958. Now, therefore, he's placed in a position where he—of course, I don't know what questions have been asked him, I won't know until Your Honor reads it, but there's this business of placing a defendant in the position of having to answer questions involving a narcotic case where he, himself, is under indictment. Now, it seems that—that it's an unfair proposition to—and I say, "unfair," with—I mean I don't mean anything personally against the Government authorities who are proceeding, but it seems unfair to call a man as a witness before a Grand Jury, when he's actually a defendant, and query him on the same subject matter. Now, apropos of that, there's a case—there's a case—that's why I took the liberty of opening—there's a case, *Piemonte, P-I-E-M-O-N-T-E, vs. United States*, 367 U.S. 556. It was decided June 19, 1961. Now, in that case an individual was serving a sentence for federal narcotic offense, and he was summoned before a Grand Jury and he was asked questions, and he invoked his privilege against self-incrimination, and the majority of the Court didn't feel he could incriminate himself, but there's this difference—and there are three dissents—an indictment had been returned against Piemonte which was dismissed at the time certiorari was granted. Now, I'm reading from the dissent of the case because it differs from our case because here we have a live indictment. In other words, if he was in jail, serving time for narcotics, then for him to claim self-incrimination, he would fall into this particular case or the *Reina* case, but where there's an open indictment,—

Judge Herlands: *R-E-I-N-A*.

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Mr. Kossman: That's right. Now, to quote from Justice Douglas, with Justice Black dissenting, "When the citizen is formally accused by indictment, he has a constitutional right to stand mute and to refuse to testify. His right not to take the stand in a federal criminal trial transcends his privilege against self-incrimination. No immunity statute, no pressure of Government, no threats of the prosecution can be used to deprive the citizen of this right." And, skipping, "We are advised that after we granted certiorari, the indictment against petitioner was dismissed on motion of the Government for lack of evidence. That seems irrelevant." But, of course, in our particular case, we have an open indictment. Now, I have practically the same situation existed in a case, *United States vs. Testa, T-E-S-T-A*, where he was held for contempt, refusal to answers questions, only it was civil contempt, as the Government takes the position, and they happened to state in the course—because it was no fixed terms to be discharged, and then he was indicted. Now, when that was called to the attention of the authorities—I'll put it to you this way—they dropped the indictment, and so the contempt case—the conviction was sustained; but again I put it to Your Honor and—because normally you would not have a person appearing as a witness before a Grand Jury who is a defendant, and not a defendant seeking to avoid trial, a defendant who is willing to go to trial any time the Government puts it down.

Judge Herlands: All right, I'll leave it to the Government.

Mr. Lawler: What Mr. Kossman says is true about Mr. Pappadio being named in an indictment. He's named in what's commonly called the Genovese case. It goes back to 1958. He was severed; he has not been tried since that time. The Government's position is that the immunity which has

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been granted to the witness would cover any testimony; we would be precluded from ever using any of his testimony in that case. And just directing myself very briefly to the two cases that Mr. Kossman has mentioned, in both of those cases the convictions were sustained by the Supreme Court, and the other case, I believe, is the Third Circuit, and the convictions were affirmed in both those cases. Mr. Kossman has cited the dissent in Piemonte and also his position in *Reine*.

Mr. Kossman: There's a difference, there's no case the Government can cite—I mean the Supreme Court level—where there's an open indictment. Now, if the Government wishes to dismiss the indictment today, then that argument is eliminated; but he's a defendant, and to say that he's granted immunity and it cannot be used against him—I mean, after all, this business of granting someone immunity is only—it's only a defense. In other words, if the Government should proceed on the indictment to try him and they say, "Well, we didn't learn anything as a result of the questioning in this particular case, then we would have to have a trial and we'd have to have a defense and plea. Now, he shouldn't be put in that position. The least that should be done is that the indictment should be dropped, or he should not be called as a witness. It seems that they shouldn't ride both sides of the horse at the same—in different directions—at the same time.

Mr. Lawler: As far as the Piemonte case is concerned, the contempt which took place while the indictment was still open—that was affirmed by the Supreme Court. As Mr. Douglas said in his dissent, the fact that it was, while the case was on appeal, dropped is of no consequence. Recently in a case, *Murphy* against the Waterfront Commission, decided by the Supreme Court, the Supreme Court has set out

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in stating that the Federal Government would be precluded, if the witness under a grant of immunity before the state, that once a witness testifies under a grant of immunity, the Government would have the burden of coming forward and showing that all of the evidence has an independent source and is not tainted in any way by the testimony given, that proceedings would be afforded the witness.

Mr. Kossman: I'll just finally line up, and thank Your Honor for your patience in listening, this is—Justice Harlan said recently in that case—

Judge Herlands: Which case?

Mr. Kossman: I don't have the citation here, but I can get it. In which he stated—which, of course—that the Grand Jury stands as a shield between—I think he was even citing the quotation in the case he quoted, the Hale or Halley, H-A-L-E or Heinke, H-E-I-N-K-E, in the course of his opinion, which he said the Grand Jury stands as a shield between the Government and the person who is called before or who they're investigating. Now, under these circumstances, we have to appeal to Your Honor, under the circumstances. Here's an individual who is a defendant, he's a witness. The Government states, well, we can—it will be a matter of defense or what not later on. We say we're entitled to an adjudication at this moment, that if they can wait for six years and not proceed to trial—and the Government usually does not wait six years if they have a good case—then it seems at first blush that they may look to try to secure a little extra evidence and put the burden upon us to show that it wasn't secured as a result of these things. I say—either try us or discharge us as a witness.

Judge Herlands: I'm prepared to rule on the point that has been raised. The objection that has just been interposed and argued in behalf of the witness is without merit, in my

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judgment, for the following reason: Section 1406 of United States Code, Title 18, expressly provides that upon the compliance with the procedure outlined in that section, which apparently has occurred here, the witness shall not be excused from testifying or from producing books, papers or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. The section further provides that no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify and produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding against him in any court, except with regard to prosecution for perjury committed or contempt committed while giving the particular testimony or producing evidence under the statutory compulsion described in Section 1406. This statutory scheme for compelling evidence and testimony in exchange for immunity is of the broadest character. There are various types of immunity statutes, both federal and state. The various types of statutes have been analyzed on numerous occasions by many courts. The particular statute is of the most comprehensive kind and measures up to all constitutional criteria. The grant of immunity is most comprehensive. It's not limited to future prosecutions. It states explicitly that the immunity, both as to prosecution and as to use of testimony, relates to any criminal proceeding against the defendant in any court; consequently, the testimony which is compelled may not be used against this defendant in any prosecution, whether based on a pending indictment or on an indictment that may hereafter be procured. The Court disagrees with learned counsel for the

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defense when he says that the defendant would be put in the position of having to assert a defense on the suspected or alleged ground that the Government is using, in a future trial of the pending indictment, evidence secured from the witness before this Grand Jury or clues or leads or links derivatively obtained by the Government from such evidence. That's not so, because the Supreme Court, as illustratively demonstrated by the excerpt mentioned by the Assistant United States Attorney, has held that the burden of proof would be upon the Government to demonstrate that it has not used the so-called fruit of a poisoned tree, to use the metaphor frequently indulged in in this area of the law; so that in the unlikely event that this witness should be prosecuted on the pending indictment on the basis of evidence, clues, leads, etc., derived directly or indirectly from this witness's testimony, in that unlikely event the Government would have to show that it's not the beneficiary of the testimony which it seeks to obtain from this defendant; and, as a practical matter, any court in such a situation would look with the utmost scrutiny at the Government's case because the grant of immunity, which replaces a constitutional privilege, would have to be most liberally construed in favor of the defendant, since constitutional rights are liberally construed, and immunity, which becomes equated with that constitutional privilege, would receive undoubtedly the same generous interpretation by the Court. I believe, therefore, that the fears outlined by counsel are theoretical, are without legal substance and do not constitute an excuse for this witness's refusal to answer the questions that are the subject matter of the proceedings outlined by the Assistant United States Attorney. Is there anything else that Mr. Kossman wants to call my attention to before we proceed?

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Mr. Kossman: Well, of course, I mean Your Honor has ruled, and I'm wondering if I could now have a copy of the questions that were asked him so that I could advise the witness properly as to the type of questions that have been asked, so I could present an argument to Your Honor based on the questions that I don't know, that before—

Mr. Lawler: The Government has no objection to turning over the transcript of August 4th before Judge MacMahon, which is the date on which the—

Judge Herlands: The record will show that Mr. Lawler is turning over to defense counsel a copy of the transcript of August 4th, 1964, and that I will now proceed, using that transcript, to ask the witness the same questions and find out whether he's going to answer them.

Mr. Kossman: Well, may it please the Court—as I say, I don't know, in the particular situation now that you wish to ask him, is this to be construed, not as a—he has been ordered in the past. Now, I'm wondering what is the status of this particular hearing? Is it to give me an opportunity to argue relevancy on particular questions?

Mr. Lawler: Your Honor, at this time we will not ask the Court to pass on the question of whether the witness has, in fact, committed a contempt. What we're asking now is the assistance of the Court, in that you would ask him the same questions, as has been done in a number of cases and has been proved in a number of cases.

Judge Herlands: Let me say this, Mr. Kossman—I might, for the record, state that Mr. Kossman is a member of the Philadelphia Bar. He's a member of the Bar of the Court of Appeals for this circuit, and I admitted him on motion this morning *pro hac vice*. The standard procedure in this type of situation, as I understand it, and the procedure that I shall be following, is for me to read these ques-

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tions—meaning the questions that he has refused to answer—to the witness here in my presence. I'm going to read them to him to find out whether he's going to answer them. As I understand it, in the event that the witness refuses to answer these questions and so advises me, that would constitute, together with the record already made, a contempt, unless there's an excuse for it or justification. Procedurally, under Rule 42-B of the Federal Rules of Criminal Procedure, the Government would serve a notice, probably by order to show cause, which is the way it's usually done, in which notice there shall be a statement of the time and place of hearing, quote, "allowing a reasonable time for the preparation of the defense," unquote, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the Judge in open court in the presence of the defendant or by an order to show cause, etc.

Mr. Kossman: Well,—

Judge Herlands: Now, I know that you haven't had a chance to look at the record. I also think that possibly two or three questions have been answered, such as where the witness lives, how old he is and whether he's married and whether he has any children; but aside from those biographical facts, all the other questions have not been answered. Now, if you want to look at the record, you'll have time to look at it. Are you planning—I'm now addressing the Assistant United States Attorney—are you planning to bring on a contempt proceeding by order to show cause?

Mr. Lawler: Yes, we are, Your Honor.

Judge Herlands: And in that order to show cause will you be setting forth or attaching thereto the transcript or reciting the questions that are asked?

Mr. Lawler: We'll set forth or we'll attach to my affidavit

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transcripts of all the Grand Jury proceedings, if Your Honor wishes.

Judge Herlands: Now, what do you want me to do now?

Mr. Lawler: Your Honor, the procedure that has been followed in a number of occasions—the witness has been granted an additional opportunity to purge himself.

Judge Herlands: Is that what you want me to do?

Mr. Kossman: Well,—

Judge Herlands: You can't object to my giving him an opportunity to purge himself, if I don't make any rulings.

Mr. Kossman: I have no objection, but I'd like to put it to Your Honor this way—when he was directed by the Court, he had no counsel at that time who assisted him.

Judge Herlands: I understand he had a lawyer by the name of Lauritano.

Mr. Kossman: But the position is that he had a lawyer who, when there was a hearing here, was ordered out, and there was no consultation with Mr. Lauritano after that, and that he has advised the Government. See, I don't want to get involved in technicalities—he has advised the Government that I was just retained in the case. Now, if Your Honor—

Judge Herlands: Let's get the fact on that.

Mr. Lawler: Your Honor, in the three previous appearances of the witness, in February, April and May, he was represented by an attorney, Mr. Lauritano, and he so stated on the record. On the morning of August 4th Mr. Lauritano appeared with the witness. It appears on the record of the transcript of August 4th that Mr. Lauritano originally came in the courtroom with the witness. Thereafter he left. Judge MacMahon stated—

Judge Herlands: The third line of the first page of the transcript just handed to you states that as follows: "This

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is an application to grant the witness immunity. I notice not only is the witness, Pappadio, here, but also his attorney is still present, Mr. Lauritano." Then Judge MacMahon said, "Well, both the marshal and his attorney should leave the room. The witness will remain. Let the record reflect no one is here except the witness, the Grand Jury, the Court and the Assistant United States Attorney," unquote.

Mr. Lawler: Thereafter Mr. Lauritano did inform me that he intended to get a new attorney in the case. That was in August. Apparently he decided not to do anything until early October.

Mr. Kossman: You mean Mr. Pappadio.

Mr. Lawler: I'm sorry—Mr. Pappadio.

Mr. Kossman: But he hasn't been called. Last Tuesday was the first time he was called between August and this week.

Mr. Lawler: That's not true. He was ordered to return on August 19, at which time he returned without an attorney.

Mr. Kossman: He had no attorney and he notified—

Mr. Lawler: And his appearance was adjourned because he didn't have an attorney.

Judge Herlands: Adjourned until October 5th?

Mr. Lawler: Adjourned to a future date.

Mr. Kossman: I'm not looking to delay; all I want is fifteen minutes, Your Honor, please.

Judge Herlands: I think that's fair.

Witness: How could you give an answer in fifteen minutes?

Mr. Kossman: Look at these questions.

Judge Herlands: It won't take you more than fifteen minutes, will it?

Mr. Kossman: Not these particular questions.

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Judge Herlands: Because I, myself, look at the record this morning and it took less than fifteen minutes.

Mr. Kossman: You see—

Judge Herlands: Just a minute, Mr. Kossman. Mr. Foreman, I want to consult with you as to your convenience. Would you like or want to go out to lunch and come back at two o'clock?

Foreman: I think the—

Judge Herlands: Because fifteen minutes in court, according to what the lawyers tell the Court, in my experience always stretches out to a multiple of three or four or five times fifteen minutes. I've never heard a lawyer say it can be disposed of in fifteen minutes when it actually was. That's whether it's a prosecution attorney or a defense attorney—no reflection on anybody. Furthermore, there'll be other proceedings after the fifteen minutes. We all had official indigestion yesterday, and I think we ought to adjourn for lunch, unless there's some particular reason that the Foreman and his colleagues feel we should forego it.

Foreman: May I discuss it with the Jury a moment?

Judge Herlands: Surely.

(Foreman confers privately with Jurors)

Foreman: We'll prefer to come back at two o'clock.

Judge Herlands: Mr. Foreman and members of the Grand Jury, you will please return at two o'clock. You may step out now while I work out some procedural details with counsel here. The record will show we're taking a recess until two o'clock.

(Lunch recess).

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Judge Herlands: You may proceed, gentlemen.

Mr. Kossman: May it please the Court, I have the questions, and there are certain objections that,—and I'll abide of course by whatever the Court rules,—that I'll state now, at the outset, before the questions are asked, and go into this. The objections are based on this philosophy: for the first one, I spoke to the DA, and he told me that it was withdrawn—

Judge Herlands: Which one are you referring to?

Mr. Kossman: On page two: "When did you get back from Florida, yesterday or the day before?" Then the DA continued, "Now I'll inform you that either yesterday or,—I withdraw that." So that applies to that particular question.

Judge Herlands: Well, there are no questions on page two that are involved in this proceeding?

Mr. Kossman: That's right. Now the questions, and the philosophy for the objections are,—I submit with deference,—are based on this proposition—

Judge Herlands: Are these objections to all the questions, or to specific questions?

Mr. Kossman: To specific questions.

Judge Herlands: First will you give the specific question, then give the rationale.

Mr. Kossman: All right. "What connection if any do you have with Temple Fashions?" "How about the Star Button Company?" No objection to the next question, "What do you know about Sherwood Fashions, Inc.?" "[Isn't it a fact that Sherwood Fashions is operated or owned by a person named Thomas Lucchese?" And then the next question, "Is it your testimony that Thomas Lucchese does not operate that company?" I don't know if that's a mistake, because since he didn't give any testi-

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mony, I mean. I haven't any objection to that question. "What's your connection, if any, with Anna Lynn Sportswear Corporation?"

I have no objection to the next question; next one; next one. Now, next, "Aren't you also known by the name, Tommy Pats?" Now, I don't know if that's a mistake.

Mr. Lawler. That's a typographical error; it should be, Tommy Paps.

Judge Herlands: Well, there is no objection, with the correction?

Mr. Kossman: With the correction. Off the record, read back the correct name,—P-a-what?

Mr. Lawler: P-a-p-s.

Judge Herlands: Well, are there any other questions—?

Mr. Kossman: No.

Judge Herlands: —on that page that are objected to?

Mr. Kossman: No.

Judge Herlands: Now, we come to page four of the transcript.

Mr. Kossman: Now of course there's this great statement, and then, "Are these allegations true—?" Now, I'll assume that it's the questions that follow are the questions that the government is interested in; is that correct? Not the preamble, so to speak? Is that correct?

Mr. Lawler: No, it's not correct; it's the entire preamble.

Mr. Kossman: I'll object to the preamble. But I have no objections to, well, I have an objection to, "Isn't it a fact that you and Lucchese are in business?" Just that question.

Judge Herlands: All the other questions you have no objection to on that page—?

Mr. Kossman: Sure—

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Judge Herlands: —other than that question on page three, and that runs over to page four?

Mr. Kossman: Well, I have an objection. I'm going to page five: no objection to this question. And then, next question, "Do you know of anybody who's engaged in the illicit narcotics traffic?" I object to that question. No objection to the next question.

I object to this question: "If you have a source of income, Mr. Pappadio, is it derived from any legitimate business?"

No objection to the following question at the bottom of the page.

Judge Herlands: There are no objections to any of the questions on page five, other than those that you've noted?

Mr. Kossman: That's correct.

Judge Herlands: And there is an objection only to the one question reading, "If you have a source of income, Mr. Pappadio, is it derived from any legitimate business?"

Mr. Kossman: Yes. Page six, well, no objection to the first, second, third, fourth, fifth, sixth. Well now, I object to this other question, "I told you once before,—"—to this series of questions.

Judge Herlands: You object to the question that begins—

Mr. Kossman: "I told you once before"—that particular question. "It has been alleged"; "it has been alleged",—and it's all once sentence.

I have no objections to the next question, but I have an objection to the question, "Did you meet anyone on those trips—?" And the next question I object to, "Did you have any dealings with anybody—"? I have no objection to the next question, to the last one,—“Did you arrange to have—?”

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Judge Herlands: We come to page seven on—?

Mr. Kossman: On page seven I object to that question—

Judge Herlands: "Did you ever—?"

Mr. Kossman: "—have any conversations with Thomas Lucchese concerning narcotics—?"

"How well—?"—no objection to that; no objection to the next one, to the next one; no objection to the next one. No objection to the next one. I object to the fifth from the bottom, "Did you ever have any discussion with John Ormento about narcotics?" And then the next one.

Judge Herlands: Do you have objection to that, "When did you have this discussion?", et cetera?

Mr. Kossman: Yes; no objection to the next one, "Who did—?" Now, I have an objection to the one starting, "In the 1930's—".

Judge Herlands: All right. Now, before we leave page seven, you have objection to four questions on that page? To the question starting, in the first line, the question,—the fourth question from the bottom, "Did you ever have any discussion", et cetera?

Mr. Kossman: Yes.

Judge Herlands: The next question, "When did you have this discussion?", et cetera, and the next question, beginning "In the 1930's,"—on that page?

Mr. Kossman: Yes; which swings over to the following page.

Judge Herlands: I understand that the government was going to withdraw that question.

Mr. Lawler: At this time we are going to withdraw that question.

Judge Herlands: The question that begins on the bottom of page seven—

Mr. Lawler: "In the 1930's,"—

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Judge Herlands: —and ends with the word “fraudulently” on page eight; that question is being withdrawn.

Mr. Kossman: I beg your pardon?

Mr. Tandy: We're withdrawing that question.

Judge Herlands: That's the question you've been referring to.

Mr. Kossman: Is that being withdrawn; the one about the 1930's?

Mr. Lawler: That's right.

Judge Herlands: You recall that discussion, Mr. Kossman?

Mr. Kossman: Yes. Then the other question, am I right, “—you received a presidential pardon”?

Mr. Lawler: That's correct.

Mr. Kossman: Well, the last question, the one on page seven, the one before the last?

Judge Herlands: Which question is that?

Mr. Kossman: “When did you have the discussion?”
Who did Ormento deal with in narcotics?”

Judge Herlands: “Who did Ormento deal with in narcotics?”

Mr. Kossman: Yes.

Judge Herlands: You have no objection to that, you say?

Mr. Kossman: No.

Judge Herlands: But you do object to the two preceding questions?

Mr. Kossman: Yes.

Judge Herlands: All right; I just want the record to be clear. And now, that states your objections?

Mr. Kossman: The nature of the objections, yes. I'll put it to Your Honor this way, to quote again from *Piemonti vs. the United States*, in this case; I have #367 United States #5666-566. I have the majority opinion with me;

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citing from the majority opinion: "The first morning before the Grand Jury, the government attorney asked petitioner, "Didn't your lawyers advise you, Mr. Piemonti, on those matters that you pleaded guilty to in the indictment, that you have no constitutional privilege against self-incrimination?" However, the government, in order to avoid any argumentative opportunities as to the scope of the area for which it sought immunity, did not attempt to secure an order directing for the particular question relating to matters involved in this. It requested a broad order of immunity, requesting the scope of what was under investigation by the Grand Jury.

The United States Attorney requested the judge to seek an order compelling testimony. So that the Court would not have any misconception of the idea of the counsel in this matter, we do think that the constitutional privilege claimed by the witness is well-taken in this matter.

Now there were the teachings in this matter. Even in the Harris case that was cited in the Second Circuit in favor of the government's petition, 34 Federal, Second, #460, the emphasis is laid that the questions themselves reveal a substantial link with those sections of the Communications Act which prohibit any person from causing the telephone—a telephone company to violate any part of the Act. In a note in the Yale Law Journal, Summer, 1963, Volume 72, there is an article entitled, "The Federal Witness Immunity Act, in Theory and Practice: Treading the Constitutional Tight-rope." Well, to try to be as brief as I can, the philosophy of the various cases in the notes is there is no general immunity statute. There are many specific immunity statutes. There is a bill to try to get immunity statutes. Their is a bill to try to get an immunity statute,—a general one. Therefore, the cases hold that you cannot ask a man a question,

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even though he has immunity, even though his answer will protect him,—you cannot ask him a question outside of the particular immunity statute scope.

In other words, you cannot ask a man, “When was the last time you robbed your father-in-law’s house?” So therefore, to come down to specifics: “What connection if any do you have with Temple Fashions?” The government would have to make a slightest showing that there would be some relevancy to the inquiry that they claim would be in the national interest. It certainly isn’t in the national interest, and that’s the basis for which you can base any specific constitutionality of any statute.

So with the Ullman (phonetic) case, dealing with national security, or the Reina case, dealing with narcotics. Now, “How about the Star Button Company?” These are personal questions. As a matter of fact, I think that we—I—have not objected, really, to questions that I might well have, like, “Did you file an income tax return for 1962?”

And I might interrupt by saying that there was a great feeling on the part of the witness that, due to his prior indictment, that he had to tread the tightrope very gingerly. But of course, that has been cleared up by Your Honor’s ruling.

Now, the next question, “Isn’t it a fact that Sherwood Fashions is operated or owned by a person named Thomas Lucchese?” Now that’s a double question. It may be operated, it may be owned, but it may be stated on the witness stand.

Then the next question, “Is it your testimony that Thomas Lucchese does not operate that company?” He didn’t give that testimony. I don’t know whether that just slipped in or not. “What’s your connection, if any, with Anna Lynn Sportswear Corporation?” Showing that there

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is no relevancy to the inquiry for which the Grand Jury is sitting—having no connection—I have no objection.

Judge Herlands: You have no objection to what?

Mr. Kossman: I mean, we have no objection, I think, to any other question on that page; is that correct, Your Honor? Or did I object?

Judge Herlands: Well, according to my box score of your objections, there is the objection to the question that begins on the last line.

Mr. Kossman: That's right; that carries over, yes. Now, that one, that really is, well,—“So that you'll have a better appreciation of the purpose of this Grand Jury, I want to advise you that there has been testimony before a Senate Committee, and statements have been made to a Federal law-enforcement agency, that a person named Thomas Lucchese is at the head of a number of people that are engaged in a number of illegal narcotics activities. It's been alleged that these people are—you also are a member of this group.” “Now what we're trying to find out is, are these allegations true or false?” “Are these allegations true—?” Now, it doesn't refer to what follows. They're referring to what precedes. Now if it involves a number of illegal activities, he certainly wouldn't have to answer that, because, if they want to say, “One of these is in the narcotics—”, there would be a difference carved out from that itself.

Now, whether they used the plural, “these allegations”, and I submit that's a tough question to answer specifically, it's a sort of a question that, if any witness was asked on the stand, let alone in the Grand Jury testimony, he'd have to run out and ask a lawyer's advice. It would be very hard. Maybe we can solve that problem now.

Now, I'll go by Your Honor's box score: do we have any more questions?

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Judge Herlands: Well, the one that you objected to, "Isn't it a fact that you and Lucchese are in business?"

Mr. Kossman: Yes, I'm sorry, I didn't—that is, if you want to say, "narcotics business", I mean, we have no objection to answering it. But if you say, "business", in a broad sense, there, then, you see, it's not within the scope of the inquiry. Now then, they use the words, "all of the people", "incidentally, now",—I don't know what the word, "incidentally" means. It seems to me we're entitled to some protection in this case. If the government is looking for information, and we're perfectly willing to give them the information, then there shouldn't be a technicality, if there was one word left out, or one syllable left out. Now, on page—is it all right to proceed?

Judge Herlands: Yes.

Mr. Kossman: On page five, "Do you know of anybody who's engaged in the illicit narcotics traffic?" Now that's an unfair question, because he—because he might be engaged in an illicit narcotics traffic, and the way it's worded, he can say, "You know me"—and it turns out later wrong,—so why should a man be asked a question, "Do you know of anybody who's engaged in the illicit narcotics traffic?" There should be some specific limitation, in order to protect a person in general, because there are a lot of people who may be engaged, and he doesn't know. "Are you—", we have no objection to that. "Have you ever been—?", we have no objection to that.

Now, we have an objection to, "If you have a source of income derived from any legitimate business—" now, suppose he's making money betting on the world series, or bets, or bookmaking? That's not within the scope of our authority, and I don't mean to be facetious. That's a protection that the law gives us.

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I'll refer to Your Honor's box score again?

Judge Herlands: Now, how about the objections on that page?

Mr. Kossman: I want to be—I want to be—with Your Honor's—I mean, when I say that there will be answers, I mean I want to tell Your Honor frankly that some of the answers of these,—I don't know; I wasn't there. In other words, a question like that, "What discussion was there?", I don't know. In other words, when I say, "answer", I don't want Your Honor to feel that I'm giving affirmative testimony on certain questions. I just don't know on certain questions.

Now I think I have an objection to the question, "When was the first time you met him?" "How long have you known—?"

Judge Herlands: Well, you didn't take an objection before.

Mr. Kossman: No, but—"When was the first time you met him"—did I miss that one?

Judge Herlands: I don't know whether you missed it or not, but there it is.

Mr. Kossman: Well, could I put that in again?

Judge Herlands: You're the master of your own objections.

Mr. Kossman: I'd like to put that in.

Judge Herlands: "When was the first time you met him?"

Mr. Kossman: I'll give the argument for that. "When was the first time you met him?" is such a—it's a hard thing to place. I mean, if you had a discussion with an individual,—in indefiniteness.

Now the next question, "Did you meet anyone on these trips?" Well, he may have met a thousand people. We cer-

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tainly object to a generality. "Have you taken any trips to Europe or any place?" I have no objection. "Did you meet anyone on these trips?" There's no question he met people on these trips,—bellboys, waiters, waitresses, et cetera. Now, "Did you have any dealings with anybody you met on those trips?" I don't,—he might have had a lot of dealings, legal, illegal,—but certainly nothing within the scope of this Grand Jury.

Now, the next question: "Did you ever have any conversations with Thomas Lucchese concerning narcotics?" Well, that's a question,—when you say, "any conversations concerning—",—I mean, people have conversations all the time. I had a conversation with the District Attorney concerning narcotics. In that broad scope, for a person to say, "No, I didn't—"; then they'll say,—oh, then they'll say—they'll bring in two witnesses who say, "Don't you remember somebody got twenty", or "forty years over something like that?" Now, maybe we're fearful, maybe we suspect the DA's office of things that are never in their heart. On the basis of past performances, we appeal to Your Honor for protection.

Now, again,—by the way,—well, to go on: "Did you ever have any discussions with John Ormento?" Those were the same things that he should be protected—he's not objecting, "Did you ever have any dealings with him?" But, "Did you ever have any discussions—?" I mean,—the word, "discussions"—I guess everybody's had discussions. Now, well, I think that ends that.

"When did you have this discussion, and what was said?" Well, I mean, I don't want, as I say,—I don't want to trespass on eternity. I mean, it's a specific statute. They cannot ask questions that are not related to the inquiry. Unless there would be a showing made to the Court by the District Attorney, I feel that we're entitled to some protection.

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Judge Herlands: By the way, certain papers were ordered sealed by Judge MacMahon: would you hand them up? I assume that's the application—?

Mr. Lawler: That's correct, Your Honor.

Judge Herlands: —together with the Attorney General's letter of approval?

Mr. Lawler: And, I also believe,—and the order of Judge MacMahon.

Judge Herlands: What is your position about citing any of it, Mr. Kossman?

Mr. Kossman: What papers are those?

Judge Herlands: Well, those—the order of Judge MacMahon,—

Mr. Kossman: No objection on that.

Judge Herlands: —this is the affidavit of Mr. Morgenthau, and the letter of Mr. Kennedy, the Attorney General.

Mr. Lawler: No objection.

Judge Herlands: The transcript of this witness, February 14, 1964, April 24, 1964 and May 8, 1964.

Mr. Lawler: As to that, I don't think there's any necessity.

Judge Herlands: Well, it has a bearing, showing what the Grand Jury was investigating.

Mr. Lawler: Then I'll withdraw the objection.

Judge Herlands: And most, if not all, of the questions—of the transcripts,—I'll repeat,—the transcripts,—that are before me,—

Mr. Lawler: That was the position I was going to take—

Judge Herlands: —in order that—in order that there may be no mystery as to what was in this envelope, I will state on the record that there are five papers. The first is an order of Judge MacMahon, dated August 4, 1964. The next is Mr. Morgenthau's affidavit and the letter of the

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Attorney General which laid predicate for the invocation of the immunity statute here involved and then you will have the three Grand Jury transcripts with the dates previously mentioned. The Government says that it will make these available for the inspection of Mr. Kossman and there is no necessity of having them sealed for purposes of this proceeding. I am returning the open envelope to Mr. Lawler. I think these records have a bearing on some of the points made by Mr. Kossman. Is there anything you want to say, Mr. Lawler, before we move ahead on this?

Mr. Lawler: The only point I wish to make with respect to the relevance of certain references, if it please Your Honor, is that the law is certainly clear that the witness may not limit the scope of a Grand Jury investigation. The mere fact that the term "narcotics" is not mentioned in a particular question or alluded to in a question, it does not mean that there is no connection between that question and the investigation of the narcotics field. There has never been any law to the effect that the Government is required to show some affirmative connection between its question and the Grand Jury investigation. The witness has been granted complete immunity. He is fully protected as to any testimony he might give before the Grand Jury, and in light of those facts, your Honor, I think the Grand Jury should be granted great latitude in its investigation of the narcotics field in this case. As to certain other objections that Mr. Kossman has made, specifically as to the trip to Europe, or depending on the question, if we receive an affirmative answer that he did take a trip to Europe, I think the questions should be altered to meet the objection; we can become more specific. With respect to certain other objections I think it's safe to say that they are just without merit. With respect to the objection as to discussions

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he had with others, I think the question is specific enough so that the witness can adequately answer.

Judge Herlands: I shall for present purposes simply indicate my views with regard to the questions objected to by Mr. Kossman, as follows: I believe that the Government has shown on the total record now before me that the Grand Jury was inquiring into the question of violations of the statutes embraced within Section 1406 of United States Code, Title 18; that the questions objected to bear a substantial relation to the subject matter of the immunity provision; that the extent in general to which a witness may inquire into the subject matter of the Grand Jury investigation is severely circumscribed in light of the secrecy in which Grand Jury proceedings have traditionally been held; that the Government has established that the Grand Jury investigation is within the confines of Section 1406; that it is not necessary for each and every question to be considered in isolation to indicate on its face that that specific question has a relationship to the subject matter of the Grand Jury's investigation so far as Section 1406 is concerned, but that the questions must be considered in conjunction and in context with each other and that the questions must be considered in their entirety, so that viewed in the aggregate they evince genuineness of an inquiry directed in good faith to the matters into which the Grand Jury is inquiring, which matters come within the scope of Section 1406; that the Government has sufficiently established the necessary link of possible violation of the statutes coming within Section 1406 on the theory which the Government here proffers: that the teaching of the Harris case decided by the Court of Appeals on July 22, 1964 has been recognized by this Court and demonstrates the propriety of these questions.

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And dealing with certain specific questions; illustratively, the question: "Did you meet anyone on these trips?" which appears on page 6, while generally formed, may be a preliminary or foundation question, because if the witness says he didn't meet anybody either at the station, or state-room, or at the airport and didn't talk to anybody, that is one thing, but if he says he met someone, that lays predicate for a question of, "Whom did you meet" "Where did you go?" and so you can take the question as vacuous. It's true that the modo et forma of a question—"Did you meet anyone on these trips?" might appear to be overgeneralized, but having in mind that even a "Yes" to such a question would be entirely innocuous, it is evident that what the prosecutor in all likelihood seeks to demonstrate is that he did meet persons and he would then ask the logical next question, who they were. If he says, "I just went for the trip and didn't meet anybody," that might open up another avenue of inquiry. Similarly the question "Did you have any dealings with anybody on these trips—" etc., which appears on page 6, while on its face rather broad and obscure and innocuous, yet considered as a preliminary foundation question is perfectly proper. Nobody is placed in jeopardy or exposed to any danger if he says "Yes." Then when he is asked what the dealings were, if he says that he purchased some perfume for his wife, obviously the question about dealings is simply a preliminary question which nobody is going to object, as to which no one will be harmed in any conceivable way merely by answering it one way or the other.

The question "Did you ever have any conversations with Thomas Lucchese concerning narcotics?" is perfectly proper. If the conversations with Thomas Lucchese related to proposed legislation in Congress or some law journal as

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the Yale Law Review or a Harvard law article, you could say so. So the supposititious case as presented by counsel cuts the other way. Now, obviously, conversations concerning narcotics, if the answer is "Yes," would be a foundation question. It only goes to show how you can take a logical argument and produce an absurdity if the logic is unrealistic.

Now, the same thing—"Did you ever have any discussion with John Ormento about narcotics?" Well, discussion means conversation—obviously a preliminary question. A mere conversation about a subject doesn't prove anything. It may, on the other hand, be a link or a clue or a lead. The Grand Jury, being an investigative body, is entitled to uncover clues or leads or links. I have attempted to express my views specifically with respect to each and every question that has been objected to, but I have indicated the approach to these matters; namely, that you have got to be realistic. And I believe that the Government is entitled to take the next step. Mr. Lawler, what do you propose?

Mr. Lawler: Your Honor, I believe that Mr. Kossman has indicated that the witness will answer these questions with the limitation—with certain objections which he intended to make and I assume that, now that his objections have been ruled on, that the witness will answer those questions. Is that correct, Mr. Kossman?

Mr. Kossman: That is my opinion.

Mr. Lawler: My only point:—if the witness intends to answer these questions, then there is no point in tying up Your Honor for the rest of the afternoon.

Judge Herlands: My understanding is, in fact, obviously, as to those questions to which you have no objection, the witness will answer to the best of his recollection and abil-

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ity; as to those questions to which you interposed an objection and as to which I have overruled the objections, he will answer the questions to the best of his ability and to the best of his recollection.

Mr. Kossman: Yes, Your Honor; that is how the case stands.

Judge Herlands: That being the case, what will the Grand Jury do?

Mr. Lawler: In the order which Judge MacMahon signed in August 4, he ordered the witness to reappear before the Grand Jury and give testimony. So that it's clear in the record, will Your Honor instruct the witness that the Government is limited to the date which has been set; that we may explore this investigation further with additional questions and that he will have full and complete immunity as to each answer he gives to those questions.

Mr. Kossman: But, of course, I take it for granted that these additional questions, he will have an opportunity to consult counsel when he is asked these particular questions.

Judge Herlands: We have two categories of questions: those which have already come before the Court and which have been ruled upon by the Court, and then we have the category of questions which shall be so-called new questions as to which, in the event the witness doesn't answer and he confers with counsel, there may or may not be proceedings, depending upon the nature of the question; but the witness is instructed that he has full and complete and comprehensive immunity under the statute which has been explained to him before by Judge MacMahon, Section 1406. I assume you have also instructed him as to the views of that statute, Mr. Kossman?

Mr. Kossman: Well, I didn't use the word "instruct."

Judge Herlands: I mean you have explained.

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Mr. Kossman: Yes, I explained it to him.

Judge Herlands: Yes; that is your function as a lawyer. Is that right?

Mr. Kossman: Yes.

Judge Herlands: And you will probably have further conversations with him on that subject?

Mr. Kossman: No question about that.

Judge Herlands: So that the record is clear: The witness knows, both through directions of the Court and through the advice of counsel, what Section 1406 means, so far as a layman can understand Section 1406?

Mr. Kossman: So far as I can, myself, understand it.

Judge Herlands: Therefore, the witness is directed to answer any and all questions that are put to him by the prosecutor or before this Grand Jury relating to the matter now pending before this Grand Jury.

Mr. Kossman: You mean with respect to the new questions and the old questions?

Judge Herlands: Clearly, as to the old questions, he has been instructed and reinstructed and re-reinstructed. As to the new questions, I am now giving him brand new instructions.

Mr. Kossman: My thought is this, Your Honor: I know Your Honor is qualified and I know how motions for rehearings this refers to in essence, but the *Reina* case holds, it's true you have immunity, but it does not permit the Government to ask new questions even though you have immunity, because they say you have no right to. Now, I don't know what new questions they may ask, so to speak.

Judge Herlands: Sufficient unto the day are the questions thereof. We will find out if it is necessary. I presume, as every one must presume, that these public motions are conducted in good faith and they are conducting a bona

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fide investigation before this Grand Jury. That appears abundantly from the papers before me and I so find. I have no reason to assume the contrary. If they go on a frolic and detour, the Court will entertain any reasonable objection. The Court hopes and trusts that counsel will not indulge in frivolous objections and I have no reason to believe that there will be any engaged in. I propose to have this Grand Jury move ahead with all due speed consistent with the rights of the witness, not only this witness but any other witness. Now, we also are realists. If there comes a day when the matter is litigated and arguments are heard, the Court makes rulings. Now, let's go ahead.

Mr. Lawler: Your Honor, the Grand Jury is returning tomorrow morning and would you instruct the witness to reappear before this Grand Jury at 10:30 tomorrow morning, room 1401?

Judge Herlands: The witness is instructed to appear before the Grand Jury tomorrow morning at 10:30, in room—?

Mr. Lawler: 1401.

Judge Herlands: Room 1401. You understand that, Mr. Witness?

Witness: Yes.

Mr. Kossman: I don't want to push, Your Honor—

Judge Herlands: And the Grand Jury will return at that time. Is that when you want the Grand Jury?

Mr. Lawler: That's correct, sir.

Judge Herlands: 10:30 tomorrow morning.

Mr. Kossman: I was going to suggest we switch to Monday.

Judge Herlands. No. It's in the interest of justice that we go ahead. All right. Recess.

Mr. Lawler: Thank you, Your Honor.

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Mr. Tendy: Ten o'clock for the Grand Jury.

Judge Herlands: The Grand Jury will be back tomorrow morning at ten o'clock.

Mr. Lawler: The witness at 10:30 in the morning.

Judge Herlands: The witness will come back at 10:30. All right. The Grand Jury may step out. If there is no further business, the Court will stand in recess.

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October 9, 1964

Sept. Spl. Re: John Doe

Mr. Tendy (Mr. Lawler)

Andimo Pappadio

ANDIMO PAPPADIO, called as a witness, and having been duly sworn by the Deputy Foreman in the absence of the Foreman of the Grand Jury, testified as follows:

By Mr. Tendy:

Q. Mr. Pappadio, as a result of the proceedings that occurred yesterday before Judge Herlands, I am going to ask you certain questions. Now, I might point out to you that this morning I am not going to ask you all of the questions that the Court directed you to answer, but I will ask most of them. My first question is this: How long have you known John Ormento? A. Twenty, thirty years.

Q. How did you meet him? A. I'd like to consult with my attorney how I met him, if it is permissible with you.

Q. Just a minute. Maybe we can kill a couple of birds here with the same stone, Mr. Pappadio. How long have you known Salvatore Santoro? Over twenty years.

Q. And how did you meet him? A. I'd like to consult with my attorney.

You are also known by the nickname Tommy Papps, is that correct? A. I'd like to consult with my attorney on that.

Q. All right. We'll leave it at just that group of questions so you won't have any difficulty in remembering what you have to talk about with your lawyer. Go ahead. A. All right.

(Witness leaves room and returns.)

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Q. Have you consulted with your attorney, Mr. Pappadio?
A. Yes, Mr. Tendy.

Q. All right. Now, my question is: How did you come to meet John Ormento? A. That's over twenty, thirty years ago, Mr. Tendy, and how I really met him I wouldn't remember exactly who made me meet him, how I met him, but he lived in the same neighborhood with me, in the same street practically.

Q. Well, would it be fair to say that you grew up together?
A. Well, I wouldn't say we grew up together. We just grew up in the same neighborhood.

Q. I see. How did you come to Salvatore Santoro? A. Same way.

Q. Same way? A. (Nods.)

Q. When did you last see John Ormento? By that I mean, when did you last sit down and talk with him or have some contact with him? A. Contact with him, you are asking?

Q. Yes. A. What do you mean by contact?

Q. When did you last have a conversation with him? A. When you say "conversation," you mean hello or goodbye or—

Q. Anything at all, any word at all that might have passed between you, either personally or on the telephone.

Q. I wouldn't remember exactly when.

Q. I don't expect you to be exact about it, Mr. Pappadio. Give me your best recollection. A. I couldn't say if it was 3 or 4 years, 2 years; 2, 3, 4 years.

Q. Do you remember where this occurred? A. Out in Lido Beach.

Q. Was that at his home? A. No, sir.

Q. He does live in Lido Beach, or don't you know that?
A. Yes, sir.

Q. Where in Lido Beach? The street? The Eva Drive.

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Q. Whose house is that? A. I don't know who owns the house.

Q. Were you in the house? A. Not when I spoke to him.

Q. On the sidewalk? A. On the street.

Q. How did you happen to meet him on that occasion? A. By accident.

Q. What were you doing in Lido Beach on that occasion?

A. I live there.

Q. Well, the house near where you spoke to Ormento, is that close to where you live? A. Yes, sir.

Q. How close? A. A block away.

Q. Do you happen to know what he was doing out there on that occasion? A. No.

Q. What did you talk about? (No response.)

Q. What did you talk about? A. We didn't talk. He says—All he says is, "Hello. How are you?" I am in the car and kept going.

Q. That is all? A. (Nods.)

Q. When was the last time you met with Salvatore Santoro? A. Six, seven years ago.

Q. Do you remember where this meeting took place? A. In the court house.

Q. Was that on the occasion when you and Santoro were in court concerning the indictment in which you were both named? A. Yes, sir.

Q. What did you talk about on that occasion? A. That we were on trial.

Q. What else did you say? A. What else did I say?

Q. Yes? A. That I'd like to take up with my attorney.

Q. What did Santoro say? A. That I'd like to take up with my attorney.

Q. Go ahead.

(Witness leaves room and returns.)

Government's Exhibit 11

A. Mr. Tendy, the reason I went out I want to make sure I don't make any technical mistakes.

Q. That is all right. You are perfectly free to talk to your lawyer at any time. A. I believe the last time I saw Salvatore Santoro, I believe, was here in this building and the thing I—we talked on when will the Government be ready to go on trial. I was here for pleading at the time. I believe that would be the last time I saw him.

Q. Have you had occasion to speak to him on the telephone since that occasion? A. No, sir.

Q. I understand that you live at 121 Eva Drive in Lido Beach; is that correct? A. Yes, sir.

Q. Do you own that home? A. My wife and I.

Q. Is there a mortgage on it? A. Yes, sir.

Q. Tell us how much, please. A. You mean the present mortgage?

Q. Yes. A. I wouldn't know the exact mortgage.

Q. Do you have an approximate idea? A. Sixteen, seventeen, eighteen thousand.

Q. If I said somewhere between fifteen and twenty thousand, would I be fairly correct? A. Fifteen and twenty thousand. I thought you said fifty.

Q. What did you pay for the home? A. Well, I don't remember.

Q. How long have you had it? A. Eight or nine years.

Q. You don't remember what you paid? A. Thirty some odd thousand.

Q. Once before in the Grand Jury and yesterday in court we made the statement and then we asked the question—Let me read it to you:

“So that you'll have a better appreciation of the purpose of this Grand Jury proceeding, I want to advise you that there's been testimony before a

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Senate committee and statements have been made to Federal law enforcement agencies that a person named Thomas Lucchese is at the head of a group of people that are engaged in a number of illegal activities. It has been alleged that some of these—that one of these alleged illegal activities is the illicit narcotics traffic. It's also been alleged, sir, that you are a member of this particular group. Now, what we're attempting to do is find out whether or not these allegations are true or false."

Are they true? A. I'd like to take that up with my attorney. What page is that, Mr. Tendy?

Q. This is on page 4 of the proceedings on August 4.

(Witness leaves room and returns.)

Q. All right, sir. A. Mr. Tendy, would you mind reading that out to me? I am not—I get a little confused, sir.

Q. Sure.

"So that you'll have a better appreciation of the purpose of this Grand Jury proceeding, I want to advise you that there's been testimony before a Senate committee and statements have been made to Federal law enforcement agencies that a person named Thomas Lucchese is at the head of a group of people that are engaged in a number of illegal activities. It has been alleged that one of these alleged illegal activities is the illicit narcotics traffic. It's also been alleged, sir, that you are a member of this particular group.—

Q. Now, what we're attempting to do is to find out whether or not these allegations are true or false. Are

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these allegations true? A. I am not a member of this group if they exist. I have no knowledge if there is a group. I do not deal in narcotics. I do not know if Mr. Luchese deals in narcotics and I do not know if anybody else in this room or out of this room is dealing with narcotics.

Q. All right; have you ever heard of a group of people headed up by Tommy Luchese? A. No, sir; outside of listening to it here and reading in the newspapers, what you read in the newspaper.

Q. I understand. Do you know Tommy Luchese? A. Yes, sir.

Q. How long have you known him? A. About twenty years.

Q. How did you meet him? A. I know him from my neighborhood.

Q. I assume that you mean the East Harlem neighborhood. A. East Harlem.

Q. And doesn't he live in Lido Beach also? A. At the present time?

Q. Yes. A. I know he lives there.

Q. Do you know where he lives? A. Do I know where he lives, Royat Street.

Q. How do you spell that? A. R-o-y-a-t.

Q. Have you ever been to his home in Royat Street? A. Yes, sir.

Q. When were you there last? A. Many, many months ago.

Q. How many months ago? A. About four months, three months.

Q. Has he ever been to your home? A. Maybe two or three or four years ago.

Q. What was the occasion of your visit to his home two

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or three or four months ago, as you put it? A. Just went over to say hello to him; went over to say hello to him.

Q. What did you say? A. Hello.

Q. That's all? A. We talked about politics.

Q. What else? A. We did not talk about narcotics, Mr. Tandy.

Q. OK, what did you talk about besides politics? A. We talked about how my business is, how bad it's going, how good his business is. He's in dresses. I'm in the manufacture of ladies' coats.

Q. Did you talk about these Grand Jury proceedings at all? A. I'd like to consult with my attorney.

Q. Go ahead; and also tell him I'm going to ask you, if you did talk about them, what did you say.

(Witness leaves room and returns.)

Q. Yes, sir. A. This was on what did we talk about?

Q. I want to know whether or not you and Luchese talked about these Grand Jury proceedings when you were to his home two or three or four months ago? A. I suppose I might have mentioned to him that I wasn't called for a while and didn't get no subpoena and I might have asked him if he was called.

Q. Well, what did you actually say in that connection and what did he say? A. That he wasn't called no more.

Q. What else? A. That's all I remember.

Q. Did you and he discuss how you were going to handle these proceedings? A. No, sir.

Q. Did you and he talk about what questions were asked of you and what questions were asked of him? A. No, sir.

Q. You didn't? A. No; not that I remember.

Q. You're sure of that? A. Not that I remember.

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Q. Well, is there any doubt about it in your mind? A. I don't remember any conversation like that.

Q. Who else was present on this occasion? A. Nobody else.

Q. Just the two of you alone in the house? A. That's right.

Q. And how many other occasions since these Grand Jury proceedings began have you spoken with Luchese about them? A. About these Grand Jury proceedings?

Q. Yes. A. I'll have to consult with my attorney.

Q. Very well. Of course, you realize, Mr. Pappadio, before you go outside—I know you're entitled to these consultations and you're going to get them every time you want one—but it prolongs the proceedings. A. I'm not trying to—

Q. I know that. I know that. I just want you to be aware of that. A. I didn't get up on every question. I tried to answer to the best of my ability.

Q. It will just necessitate additional appearances, that's all.

(Witness leaves room at 11:05 A.M. and returned at 11:14 A.M.)

The Witness: I want it to be known for the record, Mr. Tendy, that if you think I'm out there too long, that one of the Assistant District Attorneys from here was standing out there and it's very hard for us to talk, so we have to wait until he gets in the elevator to go down so we can talk.

Q. You mean just because an Assistant U. S. Attorney is there— A. If you know Mr. Kossman how loud he talks, and I think you know him by now, he's just shouting all

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over the hall, and if you want to ask something, he's just shouting.

Q. Very well. On how many occasions have you and Luchese discussed these Grand Jury proceedings since they began? A. Exact amount of occasions I don't remember, and any conversations we had I think it's with attorneys, Mr. Tendy.

Q. Approximately how many such conversations did you have? A. A few.

Q. What do you mean by a few? A. Three.

Q. Just three? A. Around three.

Q. And do you recall where these conversations took place? A. That's the privilege of attorney and client, I believe.

Q. Well, for your information, Mr. Pappadio, the privilege is not the attorney's. It's the client's. A. Well, then, it's my privilege. I'm not an attorney. You're an attorney. You can correct my English or correct my wording.

Q. I didn't mean to be critical of your English or your wording. It's just when somebody consults with a lawyer about a legal problem, the lawyer is not free to discuss that with anybody else, but there is no such prohibition as far as the client is concerned. That's what I meant when I said the privilege is the client's. A. Thank you for correcting me.

Q. Would you read that last question back to me so I don't lose my trend of thought?

(Reporter reads: And do you recall where these conversations took place?)

That's the question. A. Well, it's my privilege.

Q. You have no privilege, not on this. You have been

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granted immunity, Mr. Pappadio. A. Then I'll have to consult with my attorney. I didn't ask him that question.

Mr. Tendy: Very well; go right ahead.

(Witness leaves room at 11:17 A.M.)

(Witness Andimo Pappadio returns at 11:25 A.M.)

Q. Yes, Mr. Pappadio? A. Well, the answer to that is that we've met with lawyers in different places, and what we talked about is my privilege with the counsellors, with the different lawyers.

Q. Well, Mr. Pappadio, I can't agree that you have a privilege here, and this is going to necessitate, I'm sure, an additional instruction from the Court, to tell you that you can't decline to answer, which is, in substance, what you're doing here. A. I'm not trying to do that, Mr. Tendy. I'm trying to answer you to the best of my ability.

Q. I'm assuming what you're saying to me you're saying in good faith. I'm also telling you that you have no right to decline to answer it. A. I'm not declining to answer. I'm giving you whatever answer—

Q. Let's start all over. Where did you have these meetings? A. Meetings with lawyers in different places.

Q. Name one place. A. I can't tell you the places I met with lawyers.

Q. Are you refusing to tell me? A. I'm not refusing. I'm—think it's a privilege between the lawyers and myself.

Q. I haven't asked you so far what was said on these occasions. I'm merely asking you as of now, where did the meetings take place? A. I gave you the answer to the best of my ability, Mr. Tendy.

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Q. Are you telling me that you don't know where the meetings took place? A. I says in various places with attorneys, with lawyers being present.

Q. Let's try to be specific. Name one of these various places. A. We're going to waste more time.

Q. Pardon? A. We're going to waste more time. I got to go out and talk to my lawyer—we're going to waste more time.

Q. Didn't you just go out and talk to him about that? A. I went out and talked to him about it. This is the way I decided to answer it.

Q. What do you have to discuss with him now? A. I don't know. When I get out there, I start talking to him.

Q. You don't know why you're going out? A. I know why I'm going out.

Q. Why? A. When I get out there, I'll talk to him first, and then I'll let you know what I'm talking about.

Q. Let's take another question. Go out and tell him that I've asked you to name the places where you met with Lucchese since these Grand Jury proceedings began. That's number one. My next question to you is this—who was present at these meetings? Do you understand those two questions? A. (Nods).

Q. What's the answer to the last question? Who was present? A. Who was present—you want to know who was present at the meetings?

Q. That's right—where the meetings took place and who was present. A. That's right.

Q. Okay? A. Okay.

(Witness leaves room at 11:28 A. M., returns after Jury's ten-minute recess.)

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Q. All right, sir. A. On that question I'm answering, I'm taking—this is counsellor and client privileges.

Q. In other words, you decline to answer, because you claim an attorney-client relationship, the questions, "Where did the meetings take place?" and, "Who was present?" am I correct? A. That's right.

Q. Okay. Who arranged the meetings? A. What meetings?

Q. The meetings that we've been talking about this morning. A. Which meetings?

Q. The meetings— A. Those meetings that you're talking about here with lawyers and—

Q. That's right, that's right. A. I have to consult my attorney.

Q. Okay. Do that in just a few seconds. How long did the meetings last? A. Same answer I gave before, Mr. Tendy. Attorney and client privilege.

Q. What time of the day did the meetings take place? A. Same answer, Mr. Tendy—client and attorney privilege. Client privilege or whichever way I got to put it.

Q. Do you know of any meetings that took place between Lucchese and any of the other people who've been subpoenaed before this Grand Jury on these proceedings? A. Not to my knowledge.

Q. None of them? A. Not to my knowledge.

Q. Did you hear of any such meetings, even though you might not have been there, yourself? A. No sir.

Q. Have you discussed these Grand Jury proceedings with Carmine Tramunti? A. You say, "Grand Jury procedures," Mr. Tendy—it's so broad. You mean the questions that you ask of me, did I talk to him about it?

Q. Okay, I'll rephrase it. Have you and Tramunti had any kind of a conversation at any time concerning these

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proceedings? You can answer that one yes or no. Any kind of a conversation. A. What do you mean, if I got a subpoena?

Q. Any kind of a conversation. Did you talk to him about these things? A. Did I talk to him about what's going on in this room?

Q. That's right. A. What's going on in this room?

Q. That's right. A. No, I didn't talk to him about what's going on in this room.

Q. Did you talk to him about the fact that you'd been subpoenaed before the Grand Jury. A. When I see him up here.

Q. Those are the only times? A. That's right.

Q. You've never discussed these proceedings with him outside this Court House? A. You're getting a little technical. When you say outside this Court House, you could be walking outside in the street out of the Court House.

Q. That's right, anything outside of the doors. A. That's what I mean—you're getting tricky, and I'm only here as a witness. I'm here as a witness and you're going to make a defendant out of me.

Q. All right, I'll try not to be tricky. Have you and Tramunti talked at all about your appearance before this Grand Jury outside of this building, outside of the doors of this building? A. I don't remember, Mr. Tendy.

Q. Is it your testimony that you haven't talked? A. I don't remember.

Q. Have you met with Tramunti outside of this building any day this week? A. I'd like to talk to my attorney.

Q. Go ahead. Take up the other questions too. A. I don't even remember the other questions. I got a piece of paper; if you let me write them, I'll write them.

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Q. I'll give them to you. A. When I walk out there, I'll tell you what happens—I don't remember.

Q. You don't remember? A. Not everything. I just remember the last one.

Q. All right, I'll give you three simple questions. I want to know the time of the day that you and Lucchese met. A. (Witness writes on paper) Time of day.

Q. Got it? I want to know whether you and Tramunti have met outside of this building any time this week. A. (Witness writes on paper.)

Q. I want to know who was present at the meetings that took place between you and Lucchese. A. (Witness writes on paper.) Thank you.

(Witness leaves room at 11:46 A.M., returns at 11:54 A.M.)

Q. Yes sir. A. Who was present with Tom Lucchese and the lawyers and the time of the day.

Q. That's right. A. I take the First, the Fifth and the Sixth Amendments.

Q. O.K., now, Mr. Pappadio,— A. I met with Carmine Tramunti—go ahead.

Q. I'm sorry; go ahead. A. That was the other question you gave me, so I'd like the answer it. I met with Carmine Tramunti after we left the building here. We met a couple of times while you were popping all this.

Q. Who else was with you when you met with Tramunti? A. Attorneys.

Q. Any of the other people who appeared before the Grand Jury in these proceedings? A. There was one there; Mr. Grio.

Q. Yes? A. Carmine Tramunti, the lawyers and myself

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were eating while the ballgame was going on; I think Wednesday,—Tuesday,—the day of the ballgame; the ballgame was on. We ate and we came back here.

Mr. Tendy: Mr. Foreman, would you instruct Mr. Pappadio to return on Tuesday at ten o'clock.

Foreman: You're instructed to return on Tuesday at ten o'clock.

Witness: This Tuesday?

Mr. Tendy: This coming Tuesday; that's right; at ten o'clock.

Witness: I don't remember what day of the month it is.

Foreman: The 13th.

(Witness leaves room.)

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October 13, 1964

Sep. Spl. Re: John Doe

(fol SA) Mr. Tendy, Mr. Lawler

Andimo Pappadio

ANDIMO PAPPADIO, called as a witness, and having been duly sworn by the Foreman of the Grand Jury, testified as follows:

Mr. Tendy: For the record this is Andimo, A-n-di-m-o, Pappadio, P-a-p-a-d-i-o.

Q. Did I spell it properly? (No response.)

Q. Did I spell it right? A. Yes, sir.

Q. Mr. Pappadio, I want to return to some questions that we were asking of you last time we were here. Since you were served with a subpoena to appear before this particular Grand Jury how many times have you met with Thomas Lucchese? A. I can't recall the amount of times.

Q. Give me your best recollection, sir? A. I couldn't recall how many times.

Q. But you did meet with him? A. Yes, I met.

Q. More than once? A. More than once.

Q. Do you recall where did you meet him on these occasions? A. I met him in the street.

Q. Where on the street? A. Down in the street.

Q. Where? A. 36, 37, 38; any street there.

Q. How many times did you meet him on the street? A. Various times. A few times.

Q. Was he alone? A. Was he alone?

Q. Yes. A. Yes, he was alone.

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Q. Were you alone? A. Yes, sir.

Q. Were these chance meetings or were they arranged?
A. No; by accident. It was not arranged.

Q. Did you talk with him when you met him on the street on these occasions? A. We said hello to one other. I kept going about my business; he was probably going about his business.

Q. Did you talk about these Grand Jury proceedings when you met him on the street? A. No, sir.

Q. Where else did you met him? A. Where else have I met him?

Q. Yes? A. I answered the other day, Mr. Tendy, we met with lawyers on a few occasions.

Q. Who were the attorneys that were present at these meetings? Give me the names. A. I'd like to take that up with my attorney.

Q. Go ahead.

(Witness leaves room and returns.)

Q. Have you consulted with your attorney, Mr. Papadio? A. I feel I should not answer any questions regarding my meetings with lawyers or where I met since this is a violation of my rights under the First, the Fifth and the Sixth Amendments, especially since I am under indictment and allegations have been made about me in the Valachi hearings.

Q. Aside from the meetings on the street with Luchese that you have talked about, where also did you meet with Luchese since you first appeared before this Grand Jury, or let me amend that, since the subpoena for your appearance at this Grand Jury was served upon you? A. That's a question I answered the other day, Mr. Tendy. I said I went to

Government's Exhibit 12

his home once about three or four months ago. I may be wrong, maybe two, three weeks either way.

Q. I understand that. Besides his home, where else have you met him? A. I don't recall meeting him any place else.

Q. Have you met him any place else? A. I said we met with lawyers and that I gave you the answer on the First, Fifth and Sixth.

Q. Oh; maybe I don't understand you, Mr. Papadio. You told me that you met him by chance on the street several times. You told me you were at his home once. Do I understand you to say that in addition to these occasions you did meet with him but with lawyers but you're not going to answer questions concerning those occasions for the reasons you just read; Is that what you're saying? A. Tha's what I said.

Q. Other than the meeting at his home and other than the meeting on the street, there were other meetings with him? A. That's what I said.

Q. O.K. Who else was present at these meetings besides you and Luchese and the lawyers? Do you understand my question, sir? A. Who else was there?

Q. Yes; excluding yourself, Luchese and the attorneys, who was present at these meetings? A. I'll have to talk to my attorney.

Mr. Tendy: Go ahead.

(Witness leaves room and returns.)

Q. Have you consulted with your attorney, Mr. Pappadio? A. I talked to my attorney.

Q. Yes? A. And I refuse to answer. I respectfully refuse to answer under the First, the Fifth and the Sixth Amendment.

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Q. What time of the day did these meetings take place, Mr. Pappadio? A. I respectfully refuse to decline to answer under the First, the Fifth and Sixth Amendment.

Q. How long did the meetings last? A. I respectfully decline to answer under the First, the Fifth and the Sixth Amendments.

Q. Who arranged these meetings? A. I'd like to talk to my attorney.

Q. Do you understand my question? A. Who arranged these meetings, you said.

Q. That's right; you understand my question. A. I'd like to talk to my attorney.

(Witness leaves room and returns.)

The Witness: I respectfully decline to answer under the grounds of the First, the Fifth and the Sixth Amendment.

Mr. Tendy: Bear with me a minute, please.

Q. Let me ask you this, Mr. Pappadio. Is it your testimony that excluding the time you met Luchese at his home and the times you met him on the street and on the other occasions where you met with him, there were attorneys present? Do you understand my question? A. Say it over again.

Q. Sure. Is it your testimony that excluding the occasions where you met with Luchese, the occasion where you met with Luchese at his home and the occasions where you met with him on the street, as you told us about earlier, and the other times you met with him, there were attorneys present? A. I refuse to answer on the grounds of the First, the Fifth and Sixth Amendment. I think you're getting tricky, Mr. Tendy. If you are going to get tricky, Mr. Tendy, I'm going

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to sit here without going outside, without answering, and you do what you want to me. I'm here to give you testimony to help you to help everybody. If you are going to get tricky, I'm just going to sit here. You can lock me up, you can beat me, you can break my head or do anything and I won't answer. I don't think you should get tricky. You're here to try to get some testimony but you're getting tricky.

Q. Mr. Pappadio, if there's any question I ask you and you really don't understand it, you can tell me you don't understand it and I'll try to rephrase it, I'll try to explain it to you, and if you wish you can go out and speak to your lawyer. There hasn't been a single occasion where I said you couldn't. A. You have been kind enough to do it.

Q. This last question I asked you once and then I asked you if you understood it; then I asked you again. I just want you to know it is not my purpose to be tricky, and if there's any question that you really don't understand, simply tell me and I'll do my level best to phrase it so you do understand. I don't want you to answer any question that you don't understand.

I don't want you to answer any question unless you understand it completely; and if I can make a suggestion to you, Mr. Pappadio, if you don't understand a question, not only do I suggest that you don't answer it, but I suggest to you that you don't refuse to answer it. A. Thank you.

Q. You understand? A. Yes.

Mr. Tandy: Bear with me a minute, Mr. Foreman and Mr. Witness. Mr. Pappadio, would you step outside, please.

Witness leaves room.

* * * * *

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Judge Herlands: You may proceed. I see Mr. Paddadio.

Mr. Lawler: May the record reflect that this is a closed Grand Jury proceeding, that the only individuals present are the members of the Grand Jury, myself, Mr. Lawler, Mr. Tendy, the Grand Jury stenographers and the witness, Andimo Pappadio. Mr. Kossman, Mr. Pappadio's attorney is outside. The Government has no objection to his being present during these proceedings. I think it might facilitate matters if he were present.

Judge Herlands: All right, we'll have Mr. Kossman come in.

(Mr. Kossman enters the courtroom.)

Judge Herlands: All right, Mr. Kossman is here now as the attorney for the witness, and Mr. Lawler, if you'll tell me what this is about, we'll proceed.

Mr. Lawler: Your Honor, the Grand Jury is here seeking a direction from the Court to order the witness, Andimo Pappadio, to answer certain questions. If I might just state some of the background on the record—on August 4th the witness—

Judge Herlands: You may be seated, Mr. Kossman.

Mr. Lawler: On August 4th of this year, as Your Honor knows, the witness, Pappadio, was granted immunity under Title 18, United States Code, Section 1406. Again last Friday the witness was brought into this room before Your Honor, at which time the provisions of that statute were explained to him. He was ordered to answer certain specific questions and,

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in addition, Your Honor explained that since he could no longer incriminate himself under the provisions of that statute, he could no longer claim that privilege as to any other questions which he was asked. This morning Mr. Pappadio appeared before the Grand Jury. At that time he was asked a series of questions, and he refused to answer these questions on the basis of the First, the Fifth and the Sixth Amendments. The Grand Jury stenographers have those questions which he was asked, and I would ask them to read at this time those questions.

Judge Herlands: Are these questions that I've canvassed previously?—

Mr. Lawler: No, they're not.

Judge Herlands: —or additional ones.

Mr. Lawler: They're additional ones.

Judge Herlands: All right, we'll proceed. May we have the name of the Grand Jury reporter who's reading.

Miss Aronson: Salud Aronson.

Judge Herlands: And you're now reading from your stenotype notes?

Miss Aronson: Yes, I am, Your Honor.

Judge Herlands: All right, will you read—by the way, are these the questions and answers, the entire record, or just the questions concerning which there has been a refusal to answer?

Mr. Lawler: Only the questions concerning which there has been a refusal to answer.

Judge Herlands: All right, well, we'll hear them.

Miss Aronson: Question, "Who were the attorneys that were present at the meetings? Give me the names." Answer: "I'd like to take that up with my attorney."

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Question: "Go ahead."

Witness leaves room and returns.

Question: "Have you consulted with your attorney, Mr. Pappadio?" Answer: "I feel I should not answer any questions regarding my meetings with lawyers or where I met, since this is a violation of my rights under the First, the Fifth and the Sixth Amendments, especially since I'm under indictment and allegations have been made about me in the Valachi hearings."

Mr. Lawler: Your Honor, at which point another Grand Jury stenographer took over. I would ask her to read the following questions.

Mrs. Connolly: Excuse me—I'll have to read the whole series for the background.

Judge Herlands: May we have your name for the record.

Mrs. Connolly: Margaret T. Connolly. Shall I stay here or go there?

Judge Herlands: Wherever it's most convenient.

Mrs. Connolly: "Aside from the meetings on the street with Lucchese that you've talked about, where else did you meet with Lucchese since you first appeared before this Grand Jury, or—let me amend that—since the subpoena for your appearance before this Grand Jury was served upon you?" "That's the question I answered the other day, Mr. Tendy. I said I went to his home once about three or four months ago. I may be wrong, maybe two or three weeks either way."

Mr. Tendy: "I understand that. Besides his home, where else have you met him?" "I don't recall meeting him any place else."

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"Have you met him any place else?" "I said we met with lawyers and that I gave you the answer on the First, Fifth and Sixth."

Mr. Tendy: "Oh, maybe I don't understand you, Mr. Pappadio. You told me that you met him by chance on the street several times. You told me you were at his home once. Do I understand you to say that, in addition to these occasions, you did meet with him, but with lawyers, but you're not going to answer questions concerning those occasions for the reasons you just read? Is that what you're saying?"

Answer: "That's what I said."

Question: "Other than the meeting at his home and other than the meeting on the street, there were other meetings with him?" Answer: "That's what I said."

Question: "Okay. Who else was present at these meetings besides you and Lucchese and the lawyers? Do you understand my question, sir?" Answer: "Who else was there?"

Question: "Yes. Excluding yourself, Lucchese and the attorneys, who was present at these meetings?" Answer: "I'll have to talk to my attorney."

Mr. Tendy: "Go ahead."

Witness leaves room and returns.

Question: "Have you consulted with your attorney, Mr. Pappadio?" Answer: "I talked to my attorney and I refuse to answer. I respectfully refuse to answer under the First, the Fifth and the Sixth Amendment."

Question: "What time of the day did these meetings take place, Mr. Pappadio?" "I respectfully

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refuse, decline, to answer under the First, the Fifth and Sixth Amendment."

Question: "How long did the meetings last?"

Answer: "I respectfully decline to answer under the First, the Fifth and the Sixth Amendments."

Question: "Who arranged these meetings?" Answer: "I'd like to talk to my attorney."

Question: "Do you understand my question?" Answer: "Who arranged these meetings, you said."

Question: "That's right. Do you understand my question?" Answer: "I'd like to talk to my attorney."

Mr. Tendy: "Okay."

Witness leaves room and returns and states: "I respectfully decline to answer under the ground of the First, the Fifth and the Sixth Amendment."

"Let me ask you this, Mr. Pappadio—is it your testimony that, excluding the time you met Lucchese at his home and the times you met him on the street, and on the other occasions where you met with him there were attorneys present? Do you understand my question?" Answer: "Say it over again."

Question: "Sure. Is it your testimony that, excluding the occasions where you met with Lucchese, the occasion where you met with Lucchese at his home, and the occasions where you met with him on the street, as you told us about earlier, and the other times you met with him there were attorneys present?" Answer: "I refuse to answer on the grounds of the First, the Fifth and the Sixth Amendments. I think you're getting tricky Mr. Tendy."

Should I continue, Mr. Tendy?

Mr. Tendy: [Nods]

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"If you're going to get tricky, Mr. Tendy, I'm going to sit here without going outside, without answering, and you do what you want to me. I'm here to give you testimony, to help you, to help everybody. If you're going to get tricky, I'm just going to sit here. You can lock me up, you can shoot me, you can break my head or do anything and I won't answer. I don't think you should get tricky. You're here to try to get testimony, but you're getting tricky."

Question: "Mr. Pappadio, if there's any question I ask you and you really don't understand it, you can tell me you don't understand it and I'll try to rephrase it, I'll try to explain it to you, and if you wish you can go out and speak to your lawyer. There hasn't been a single occasion where I said you couldn't." "You have been kind enough to do it."

Question: "The last question I asked you once and then I asked you if you understood it. Then I asked you again. I just want you to know it's not my purpose to be tricky, and if there's any question that you really don't understand, simply tell me and I'll do my level best to phrase it so you do understand. I don't want you to answer any question that you don't understand. I don't want you to answer any question unless you understand it completely; and if I can make a suggestion to you, Mr. Pappadio, if you don't understand a question, not only do I suggest that you don't answer it, but I suggest to you that you don't refuse to answer it." Witness: "Thank you."

Question: "You understand?" Answer: "Yes."
Witness leaves room.

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Oh, no, excuse me.

"Would you step outside, please."

Witness leaves room.

Mr. Lawler: Your Honor the questions which the witness refused to answer on the basis of the First, Fifth and Sixth Amendments are the questions which we would ask the Court to direct him to answer.

Mr. Kossman: May I—

Judge Herlands: Mr. Kossman, you want to say anything?

Mr. Kossman: May it please the Court, mindful of Your Honor's admonition that when we go back, that we shouldn't object to frivolous questions, I think that—that the witness—I mean when he came back, he wasn't asked—or if he was asked, just a few of the questions that the Government came down and asked your Court to—for an order and which your Court, after argument, did order. Now, I think—I don't know, they would know best,—it's very difficult to communicate with the client to know how many questions—but I think he only answered two or three of those questions, although he was prepared to answer every one of them in pursuance to Your Honor's order. Now they go into a different thing, different questions, altogether, which involve the most sacred relationship, really,—attorneys and clients. Now, he stated that he was under indictment. He stated,—because this is a very unusual type of case—He stated that—you told me that—"It's been alleged, sir, that you are a member of this particular group. It's alleged that one of these illegal activities is the—" —he also stated. Now he's prepared to answer those questions if they've not already asked him. I think they haven't.

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Judge Herlands: You're not addressing yourself to the issue.

Mr. Kossman: Well, I'll put it to you this way,—

Judge Herlands: Just a minute, Mr. Kossman.

Mr. Kossman: I beg your pardon.

Judge Herlands: The only thing performing now is whether you're going to answer these questions.

Mr. Kossman: Well, if Your Honor pleases, now they're asking questions not that he was originally ordered.

Judge Herlands: We know all that.

Mr. Kossman: Now, I submit, based on—and it's very hard for me to follow these questions, I mean in terms—but, generally, they speak of his meetings with lawyers and was anybody present in meetings of lawyer, and I suggest that, number one, it's not within the scope of the area for which it sought immunity. Now, in the Piemonte case the Government attorney asked this question, quote, "Did your lawyer advise you, Mr. Piemonte, on those matters that you pleaded guilty to in the indictment, that you had no constitutional privilege against self-incrimination?" However, the Government, in order to avoid any argumentative opportunities as to the scope of the area for which it sought immunity, did not attempt to secure an order directing answers for the particular questions relating to matters involved in his former conviction and, in fact, United States Attorney told the District Judge in seeking the order, so that the Court could not have a misconception of the idea of Government counsel in this matter, "We, too, think that the constitutional privilege claimed by the witness is well taken in this matter." Now, I don't know if I've made myself clear,—

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Judge Herlands: You've made yourself very clear, and it's also very clear that you're not directing yourself to the matter.

Mr. Kossman: My thought is this, that in the area—

Judge Herlands: What area? They're not asking him about communications with the lawyers.

Mr. Kossman: Well, they're asking who the names of the lawyers are,—

Judge Herlands: That's all right.

Mr. Kossman: —where did they meet,—

Judge Herlands: That's all right.

Mr. Kossman: --who was present.

Judge Herlands: That's all right.

Mr. Kossman: Well,—

Judge Herlands: Well, what? You know that the privilege between attorney and client only relates to communications.

Mr. Kossman: Well, if the Court please, the question—

Judge Herlands: Now, look, I don't want to waste any time. If you'll address yourself to any or all of the questions involved here, I'll listen to you for as much time as you want, but I don't want to spend time listening to matters immaterial and irrelevant.

Mr. Kossman: But the question is—is this relevant to the inquiry?

Judge Herlands: It's relevant.

Mr. Kossman: "Who was present?"

Judge Herlands: Precisely. This is a Grand Jury investigation. The scope of the inquiry is of the broadest character known to the law.

Mr. Kossman: But there's limitations.

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Judge Herlands: There are limitations. They can't go outside the scope of their legitimate concern, but when they're conducting an investigation of this kind and character, they have a right to find out with whom the witness met and where and when and who was present. Now, where the witness meets with a lawyer and the lawyers are the only ones present—and I want to repeat that, where the meeting is only with the lawyer, with no one else present—and they're meeting in the capacity of an attorney and client, then, of course, as the Assistant United States Attorneys, themselves, know, the communications are privileged; but if he meets with lawyers and there are other people present, that destroys the confidentiality of the communications.

And going beyond that, regardless of questions relating to communications in the presence of third parties, it is outside the scope of the confidentiality rule to ask a witness who his lawyers were, where they met and when they met because that still does not cover communications.

Now, that's rudimentary, and the most ingenious argument can't get away from those principles of evidence.

Now, if there's any light you can shed on the issues that are involved and posed by these questions, I shall be delighted to give you every opportunity, but it would seem to me from what you have said thus far that you have gone off on tangential matters.

Mr. Kossman: Well, of course, I was comparing it to the question about, did your lawyer advise you, but Your Honor, you have eliminated all communications.

Government's Exhibit 12

Judge Herlands: There is no statement here about advice. There was no question about advice of lawyers. Moreover, hypothetically, and it's only hypothetical, even if the lawyer gave him advice but there were third party persons present, that would destroy the confidentiality of the communication, but that's only hypothetical because they haven't reached that point, if they ever do.

Mr. Kossman: I think the privilege extends in the case of lawyer's employees who would be present, but we haven't reached—

Judge Herlands: You haven't reached the confrontations and admissions as to whether or not a law clerk or partner or stenographer who works for the lawyer is considered as part of the personnel of the lawyer. We haven't come to that. There are cases that deal with that. This is an easy case.

Mr. Kossman: Well, of course, if—if the Court pleases, the privilege belongs to the client, not the attorney.

Judge Herlands: But he's acting under advice of counsel.

Mr. Kossman: I can't say he's acting under advice of counsel. Counsel explains to him certain things, but—

Judge Herlands: Well, I'm ready to instruct him to answer each and every one of the questions that have been put on the record this morning.

Mr. Kossman: I wish—I just can't grasp—I mean, generally, I have your Honor's explanation—

Judge Herlands: Mr. Pappadio, will you step forward and sit at the table where Mr. Kossman is, at this chair.

Government's Exhibit 12

Do you want me to explain it to him again or do you feel you want to explain.

Mr. Kossman: Well, I'd rather your Honor would explain it, but I'd like to have the particular question, what question—I mean, each question, because some seem repetitious: did you meet by accident and did you not meet by accident, and I don't know what all these questions involve.

Judge Herlands: I'll have the Grand Jury Reporter who was reporting the proceedings reread question by question the questions that were read by the other Grand Jury Reporters, and if you will hesitate between each question I will then make a ruling with regard to that question.

(To Reporter): You are now going to report what Miss Cordes is going to read.

(To Miss Cordes): While you're looking I'll give certain general instructions to the witness.

Mr. Pappadio, nobody wants to invade the right that you have to talk with a lawyer, whether a lawyer in the past or now. If you had conversations with the lawyer at any time and you spoke with the lawyer and the lawyer spoke with you, what you told the lawyer and what the lawyer told you is confidential and you don't have to answer any question as to what the lawyer told you or you told the lawyer.

Now, if there was somebody in the lawyer's office present, like the lawyer's partner or the lawyer's secretary, that also does not destroy the confidential character of what you told the lawyer and what the lawyer told you, because those people who work for the lawyer are considered as part of the lawyer's staff, and that privilege would cover it.

Government's Exhibit 12

Now, the prosecutor has a right to ask you when you met the lawyer, where you met the lawyer, whether anybody was present, who was present, and questions like that, because the law only keeps confidential what the lawyer said to you and what you said to the lawyer, but the privilege of confidential communications does not apply to anything other than the communications, which in plain English means what you tell the lawyer and what the lawyer told you, but if they ask you who the lawyer was, where is his office, who was present, when did you meet, so forth and so on, that's not confidential. Do you understand?

Mr. Pappadio: (Nods.)

Judge Herlands: We'll see how the questions and answers fit in within that scope.

Mr. Kossman: Maybe if I had an opportunity in the light of Your Honor's explanation to go over the language with him.

Judge Herlands: Well, we'll do it right now. These questions are very simple. You can sit at your table; nobody will hear what you tell him. We'll take the questions up seriatim. You can sit back there at your own table, Mr. Kossman, so you will be able to talk audibly to your client but inaudibly so far as the government lawyers are concerned.

All right, we'll take them up question by question.

Miss Cordes, Reporter: "Who were the attorneys that were present at the meetings? Give me the names." Now, do you want the answers?

Judge Herlands: No.

Miss Cordes: There was a colloquy and he went outside and came back. Then that went over to the next question.

Government's Exhibit 12

Judge Herlands: Well, was that question answered or not answered?

Miss Cordes: No. Well, he went out to see the attorney. Do you want the answer?

Judge Herlands: Yes, I'd like to get the answer on the record.

Miss Cordes: I'll read it. "Answer: I'd like to take that up with my attorney. Question: Go ahead. Witness leaves room and returns.

Question: Have you consulted with your attorney, Mr. Pappadio?

Answer: I feel I should not answer any—"

Mr. Kossman: I don't want to impose on you but could you speak louder?

Judge Herlands: That's Miss Cordes' normal voice.

Miss Cordes: I'll raise it.

Judge Herlands: May I suggest that you move over with your client and you can get up close to the lectern.

All right, we're still on the first question. He went out and came back and now we have the question.

Miss Cordes: Do you want me to start over?

Mr. Kossman: I guess you better.

Miss Cordes: "Question: Who were the attorneys that were present at the meetings. Give me the names. Answer: I'd like to take that up with my attorney. Question: Go ahead." Witness leaves the room and returns.

"Question: Have you consulted with your attorney, Mr. Pappadio? Answer: I feel I should not answer any questions regarding my meetings with lawyers or where I met since this is a violation of

Government's Exhibit 12

my rights under the First, Fifth and Sixth Amendments, especially since I'm under indictment and allegations have been made about me in the Valachi hearings."

Judge Herlands: That's the end of that question.

Miss Cordes: At this point another reporter took over and there was a little colloquy there and then her first question.

Judge Herlands: All right, now, we'll hold that the question which has been under discussion will have to be answered and I direct the witness to answer that question.

Mr. Kossman: May I have a conference?

Judge Herlands: You can go ahead and talk with him. The record will show that Mr. Kossman and the witness are conferring.

Mr. Kossman: I might say some of the difficulty comes, I'm sorry, with "present at the meetings." I mean, now, he has been under indictment since 1958. Now he's had numerous attorneys and numerous meetings and here he might answer a question, I mean—and from the nature of the question itself, "who were the attorneys present at the meetings?" all in that context, since he's first been subpoenaed before this Grand Jury, February 3, 1964? Attorneys since February also includes February 3, 1964?

Judge Herlands: If there's any question that isn't clear or the witness feels that he can't answer because of its ambiguity or because the coverage is uncertain, he can also ask, which Mr. Tendy out of an abundance of patience and with commendable fairness explained at great length to this witness.

Mr. Kossman: Of course, earlier, if the Court.

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please,—if the past is any guide to the future—when we had these questions,—

Judge Herlands: We are getting off the track, Mr. Kossman.

Mr. Kossman: Is it possible to have a typewritten copy?

Judge Herlands: No; we'll proceed this way. There are very few questions. It's the third time they're read already.

Mr. Kossman: What's the direction?

Judge Herlands: All right; the witness is directed to answer that question, the question that's just been discussed.

Now, will you proceed.

Miss Cordes: "Aside from the meetings on the street with Luchese that you talked about—"

Mr. Kossman: I'm sorry—I'm not so fast—

Judge Herlands: You don't need to take it down in shorthand.

Miss Cordes: "Aside from the meetings on the street with Luchese that you talked about, where else did you meet with Luchese since you first appeared before the Grand Jury, or let me amend that, since the subpoena for your appearance before this Grand Jury was served upon you?"

Mr. Kossman: Am I correct—aside from the meetings with Luchese on the street, where else have you met since the subpoena—where else have you met? Is that how broad it is?

Miss Cordes: "Where else did you meet with Luchese?"

Mr. Kossman: "Where else did you meet with Luchese—?"

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Miss Cordes: "—since the subpoena was served."

Judge Herlands: The witness is directed to answer that. All right, next question.

Miss Cordes: "Who else was present at these meetings besides you and Luchese and the lawyers?"

Judge Herlands: The witness is directed to answer that. Next.

Miss Cordes: "What time of the day did these meetings take place, Mr. Pappadio?"

Mr. Kossman: What—

Judge Herlands: "What time did these meetings take place?" The witness is directed to answer that.

Miss Cordes: "How long did the meetings last?"

Judge Herlands: "How long did the meetings last?" The witness is directed to answer that. Next.

Miss Cordes: "Who arranged these meetings?"

Judge Herlands: "Who arranged these meetings?" The witness is directed to answer that.

Now, you better read the record as you have it there because there's a series of questions and rephrasing. I think in the interest of clarity just read what you have and that will develop the ultimate question.

Miss Cordes: Well, I skipped his last answer. "Let me ask you this, Mr. Pappadio. Is it your testimony that excluding the time you met Luchese at his home and the times you met him in the street and on the other occasions where you met with him, were attorneys present?"

Mr. Kossman: I'm sorry, I have difficulty following that.

Judge Herlands: All right, just read it as it is.

Reporter: "Is it your testimony that excluding

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the time you met Lucchese at his home, and the times you met him on the street, and on the other occasions where you met with him, there were attorneys present?" And, "Do you understand my question?" And the answer is, "Say it over again."

Judge Herlands: All right, now, suppose you go ahead.

Reporter: I'll go ahead. "Is it your testimony that excluding the occasions where you met with Lucchese at his home, and the occasions where you met with him on the street, as you told us about earlier, and the other times you met with him, there were attorneys present?"

Judge Herlands: What's the answer?

Reporter: "I refuse to answer on the grounds of the First, the Fifth and Sixth Amendments."

Judge Herlands: Will you continue reading ahead?

Reporter: That's where he begins, "I think you're getting tricky, Mr. Tendy."

Judge Herlands: All right, now, I recall that discussion. What's the next question after the discussion? And I think Mr. Tendy then said that if there's anything he doesn't understand, he should ask. And did Mr. Tendy come back to a question?

Reporter: I think that's the last question.

Judge Herlands: Well, the last question, as the record stands, is a question in which the witness was asked with regard to meetings where attorneys might have been present, and the meetings referred to are meetings other than meetings between the witness and Lucchese at Lucchese's home, or meetings with Lucchese on the street or other occasions.

Government's Exhibit 12

And stated in plain English, they're asking the witness whether there were any meetings with Lucchese at which lawyers were present; and that, in order to focus the question, Mr. Tendy excluded a previous question about meetings with Lucchese on the street or at the home of Lucchese. And this question is a question which may be paraphrased to mean, "Did you ever meet with Lucchese on an occasion at which lawyers were present?" Is that the question?

Mr. Tendy. That's it, Your Honor.

Judge Herlands: All right. So, if such a question is asked,—I'm especially addressing the witness, so that there won't be any doubt as to which question we're asking,—if you are asked, Mr. Pappadio, whether there were any meetings with Lucchese at which lawyers were present, you will have to answer that question; do you understand that?

Witness: Yes, sir.

Judge Herlands: All right.

Mr. Lawler: I want to state at this time that we also intend to ask the witness where these meetings took place.

Judge Herlands: Well, I've explained to Mr. Pappadio that the privilege between the client and the lawyer relates only to communications between the lawyer and the client, and the client and the lawyer, but it does not relate,—it does not cover where the lawyer's office was when he met with the lawyer, how long the meetings lasted, what the retainer was,—other questions not concerned with what was said between the lawyer and the client.

Mr. Lawler: We have nothing additional, Your Honor.

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Judge Herlands: All right. The witness is directed to answer the specific questions that have come before us, and for his guidance I've given general instructions and directions, so that we may avoid the necessity of having to come back here again. But if it's necessary to come back here again, we have inexhaustible patience. And I think that everybody connected with this case had better realize by this time that the sooner these questions are answered, the better. Because whatever time is necessary to go through the formalities, we will devote to it.

Mr. Lawler: With Your Honor's permission, rather than travel back to the fourteenth floor, we'd like to use this courtroom as a jury room, and continue here.

Judge Herlands: All right; I hereby declare this room #318 to be a room for the use of the Grand Jury, with the same force and effect as if it were on the fourteenth floor; if you need such a ruling.

All right, Mr. Kossman, you're excused.

Mr. Kossman: Last time, I asked for fifteen minutes and it was granted, and we had a satisfactory result, in the sense that we were prepared.

Judge Herlands: We see no reason for it.

Mr. Kossman: Could I have ten minutes?

Judge Herlands: There's no reason for it. I've given instructions; the questions are clear and simple, and I think that any further delay is not called for.

Mr. Kossman: If the Court pleases, I'm faced with the proposition that he has refused, and it was before we heard the instructions. I'm only asking

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for, let us say, five minutes, in order to give him my views on the subject.

Judge Herlands. Will you grant Mr. Kossman five minutes?

Mr. Tendy: We have no objection.

Judge Herlands: All right. Five minutes. The time is now twenty-five to two, and the Grand Jury will go into session at twenty to two.

Mr. Kossman: Thank you.

Judge Herlands: All right.

* * * * *

Mr. Tendy: Mr. Foreman, would you remind the witness that he's still under oath?

Foreman: Mr. Pappadio, you're still under oath.

The Witness: Thank you.

By Mr. Tendy:

Q. Mr. Pappadio, who were the attorneys who were present at these meeting? A. I respectfully decline to answer on the grounds of the First, the Fifth and the Sixth Amendment.

Q. Aside from the meetings which you described, which took place on the street, where else did you meet with Lucchese? A. I decline to answer, under the First, the Fifth and the Sixth Amendment.

Q. Who else was present at these meetings beside yourself, Lucchese and the attorneys? A. I respectfully decline to answer under the First, the Fifth and the Sixth Amendment.

Q. What time of day did these meetings take place? A. It was daytime; the exact time I don't know.

Government's Exhibit 12

Q. Was it in the afternoon? A. Afternoon? Afternoon.

Q. Would it have been in the evening? A. I might have walked into there maybe five, six o'clock, seven o'clock.

Q. How long did these meetings last? A. I don't recall how long they lasted.

Juror: We can't hear him.

Mr. Tendy: Why don't you turn around?

Witness: I don't recall how long they lasted.

Q. Did some of them last an hour? A. I don't really remember.

Q. Did they last less than an hour? A. I don't remember. I didn't watch the watch, how long it lasted, how long it didn't last.

Q. Well, give me your best recollection, Mr. Pappadio. I realize fully that it's an approximation as to the length of time. A. A couple of hours.

Q. All right; how many of such meetings were there? A. I respectfully decline to answer on the grounds of the First, the Fifth and the Sixth Amendment.

Q. Who arranged the meetings? A. They probably were arranged by our lawyers.

Q. Do you know? A. Well, my lawyer called me in the office and told me we were going to meet; that's all I know. Whether we met in his office or somebody else's office, he'd be the one who called me and told me we were to get together.

Q. Now, when you say "my lawyer", "the other lawyer", which lawyer are you referring to? A. To Lauritano, at the time. I don't know who called the meetings. I don't know who called the meetings; which lawyer called who.

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Q. Where did the meetings take place? A. I respectfully decline under the First, the Fifth and the Sixth Amendment.

Q. The record indicates that so far as these Grand Jury proceedings are concerned, Mr. Lauritano ceased to represent you some time in August, whatever the date was, whenever the date was. Now, since he ceased to represent you in these proceedings, have you had any such meetings with Lucchese? A. I don't know what you mean by "ceased", Mr. Tendy.

Q. Do you remember, in August, Mr. Pappadio, you appeared before the Grand Jury on one occasion, whatever the date was, and it's not important when it was. It was some time in August, and you told the Grand Jury generally that Mr. Lauritano no longer represented you? Do you recall that? A. Do you want me to tell you how that happened, Mr. Tendy?

Q. No, I don't. It's not important right now, Mr. Pappadio. My question is, since that occasion when you told us he no longer is your lawyer, have you met with Mr. Lucchese? A. I still go to Mr. Lauritano for legal advice.

Q. That's not my question. Since the occasion when you told the Grand Jury that he's not your lawyer in these proceedings, have you, since that time, met with Lucchese? A. Where?

Q. Any place. A. In the street, do you mean?

Q. Any place at all. A. I met with Mr. Lucchese.

Q. How many times? A. I don't remember how many times. I met just like—I don't remember how many times.

Q. Where did you meet him? Now, we're talking, now, since the time that Lauritano, Mr. Lauritano, stopped representing you on your appearance before the Grand Jury? A. Mr. Lauritano still represents me, Mr. Tendy. Not in

Government's Exhibit 12

this matter; not fully a hundred percent in this matter, because of constitutional law here. So I use Mr. Kossman.

Q. I understand you completely; but since the occasion when you told the Grand Jury that Lauritano did not represent you, my question is,—let me rephrase it. Since the occasion when you told the Grand Jury that Lauritano did not represent you in these proceedings, where have you met Lucchese? A. Was that one of the questions I was just directed to answer?

Q. No, but in general— A. Well, can I talk to my attorney?

Q. There's no reason for you to talk to your attorney. A. Well, then, I'll take the First, Fifth and the Sixth.

Q. But you have met with Lucchese, isn't that right? A. I'll take the First, Fifth and Sixth.

Q. But you just told me you did meet with him. A. I'll take the First, the Fifth and the Sixth Amendment.

Mr. Tendy: Mr. Foreman, would you instruct this witness that he's excused, subject to a twenty-four hour recall?

Foreman: You're excused subject to a twenty-four hour recall.

Witness: Thank you.

Mr. Tendy: Mr. Pappadio, on second thought, would you just wait in the hallway, please?

(Witness leaves room.)

(Witness Andimo Pappadio returns.)

Foreman: The witness is still under oath, right, Mr. Tendy?

Mr. Tendy: Thank you.

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Q. Mr. Pappadio, aren't you also known as Tommy Paps? A. I don't know if anybody called me by that name in many, many years—from the school days. That's my school days. The teacher called me by that name.

Q. Mr. Pappadio, I'm now going to ask you some of the questions that Judge Herlands directed you to answer on the time you were before him prior to today. The first one is this Mr. Pappadio—At the narcotics trial of Vito Genovese there was testimony that you attended a meeting at the home of Rocco Mazzie. Did you attend this meeting? A. No, sir.

Q. Do you know of such a meeting? A. No sir.

Q. Do you know Rocco Mazzie? A. No sir.

Q. Do you know a person named Roggie? A. No sir.

Q. Do you know Vito Genovese? A. Met him in this courtroom, I think—318 here.

Q. Is this your only contact with him? A. That's the only contact.

Q. Do you know Vincent Gigante, or a person by that name? A. No, I didn't know him at all. Never met him here.

Q. Have you taken any trips to Europe or any place else outside of the continental United States in the past ten years? A. Yes sir.

Q. To where? A. I went to see my daughter in Italy.

Q. When was this, Mr. Pappadio? A. '57 and '58.

Q. Did you make a trip each year or did it overlap? A. A trip in each year.

Q. Did you have any business dealings with anybody on these trips? A. When you say business dealings, Mr. Tendy, you mean if I went to buy perfume and stuff like that?

Government's Exhibit 12

Q. I'll tell you what, Mr. Pappadio, I'll withdraw the question. A. All right.

Q. Let me withdraw the question. A. I'm becoming half a lawyer around here.

Witness: Want to know what I said? I said I'm becoming half a lawyer around here.

Q. That's it, Mr.— A. How about 1962 income tax? You want to ask me that question too?

Q. No. A. Okay. Thank you.

(Witness excused.)

Defendant's Exhibit A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Cr. 156-157

THE UNITED STATES,

VS.

#30

ANDIMO PAPPADIO,

Defendant.

Violation of: T. 21

Secs. 173 and 174, U.S. Code

Unlawful conspiracy to violate the U.S. Narcotics Laws

(One count)

7-7-58—Filed Indictment. * * *

* * * *

12-1-58—Govt moves to sever deft Andimo Pappadio,
granted.

HICKS, J.

This is a true extract of part of the entry
of 12-1-58, ONLY.

September 3, 1964

JAMES E. VALECHE, Clerk

By C. J. WALLACE

Deputy Clerk

Judgment and Commitment Appealed From

(118)

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

No. 64 Cr. 897

[SAME TITLE]

On this 30th day of October, 1964 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant having been found guilty of criminal contempt in that he wilfully disobeyed the lawful orders of this Court by his refusal on October 13, 1964 to answer questions which he was ordered and directed by this Court to answer on August 4, 1964 and October 13, 1964 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty of criminal contempt and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of Two (2) Years, or until further order of this Court, should Andimo Pappadio answer before the Grand Jury the questions which appear on the record as he was ordered to answer and should defendant answer those questions before the expiration of said sen-

Judgment and Commitment Appealed From

tence or the discharge of said Grand Jury, whichever may first occur, the further order of this Court may be made terminating and modifying the sentence of imprisonment.

IT IS ADJUDGED that the defendant's oral motion for bail pending appeal is denied.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

WILLIAM B. HERLANDS
United States District Judge

JAMES E. VALECHE
Clerk

Notice of Appeal

()

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

64 Cr 897

[SAME TITLE]

Name and address of appellant: Andimo Pappadio, 121 Eva Drive, Lido Beach, New York.

Name and address of appellant's attorney: Lauritano, Schlaeter & Schneider, 205 West 34th Street, New York, New York. Of Counsel: Jacob Kossman, 1325 Spruce Street, Philadelphia, Pennsylvania; Philip R. Edelbaum, 250 Broadway, New York, New York.

Offense: Criminal Contempt of Court, Rule 42B, F. R. Criminal Procedure, Title 18, U.S.C., §401.

Concise statement of judgment or order, giving date, and any sentence: Convicted of criminal contempt on October 30, 1964 by William Herlands P.J. and sentenced to 2 yrs.

Name of institution where now confined, if not on bail: Paroled in attorney's custody pending application for bail to Court of Appeals.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Second Circuit from the above-stated order and judgment.

ANDIMO PAPPADIO,
Appellant

Dated: October 30, 1964
New York, New York

[fol. 240]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 248—September Term, 1964.

Argued November 18, 1964

Docket No. 29298

UNITED STATES OF AMERICA, Appellee,

—v.—

ANDIMO PAPPADIO, Defendant-Appellant.

Before: Lumbard, Chief Judge, Medina and Marshall,
Circuit Judges.

Appeal from an order of the United States District Court
for the Southern District of New York, William B. Her-
lands, J., which adjudged the appellant guilty of contempt
for his refusal to answer questions before a federal grand
jury.

Affirmed.

[fol. 241] John E. Sprizzo, Assistant United States
Attorney, New York, N. Y. (Robert M. Morgen-
thau, United States Attorney for the Southern
District of New York, and John S. Martin, Jr.,
Assistant United States Attorney, New York,
N. Y., on the brief), for appellee.

Maurice Edelbaum, New York, N. Y. (Philip R.
Edelbaum and Lauritano, Schlacter & Schneider,
New York, N. Y., and Jacob Kossman, Philadel-
phia, Pa., on the brief), for defendant-appellant.

OPINION—May 24, 1965

LUMBARD, Chief Judge:

Andimo Pappadio appeals from a conviction for contempt for refusing to answer five of the questions put to him by a federal grand jury sitting in the Southern District of New York. We find the conviction and sentence to be proper, and we affirm the judgment of the district court.

As part of the grand jury's inquiry into alleged violations of the federal narcotics laws, it had Pappadio summoned before it. On February 14, 1964 and again on April 24 and May 8, he was asked numerous questions, but he gave only his name and some other biographical information; he refused to answer the other questions on the ground that his answers would tend to incriminate him.

On the government's application, Judge MacMahon on August 4, 1964 issued an order under 18 U. S. C. §1406,¹

¹ "§1406. Immunity of witnesses

"Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a), is necessary to the public interest, he upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected

[fol. 242] which directed Pappadio to testify and granted him immunity from prosecution with respect to such testimony. However, Pappadio again refused to testify when he appeared before the grand jury later that day and on October 6. (At these and earlier appearances he sometimes cited the First Amendment as well as the Fifth.)

On October 8, Judge Herlands specifically ordered Pappadio to answer the grand jury's questions, and Pappadio did answer some questions the following day. But he refused to give any information concerning his meetings with Tommy Lucchese and, it appears, one or more lawyers. He based his refusal principally on the attorney-client privilege but also on the First, Fifth and Sixth Amendments.

After a hearing before Judge Herlands, who found his claim of privilege to be without merit, Pappadio answered [fol. 243] questions as to the duration and time of day of the meetings. However, he still refused to answer five of the questions, and these are the questions at issue on this appeal:

"Mr. Pappadio, who are the attorneys who were present at these meetings?"

"Aside from the meetings which you described, which took place in the street, where else did you meet with Lucchese?"

"Who else was present at these meetings besides yourself, Lucchese and the attorneys?"

"All right. How many of such meetings were there?"

"Where did the meetings take place?"

to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

A hearing pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure was held on October 28 and 30. Judge Herlands found Pappadio guilty of contempt and sentenced him to imprisonment for two years or "until further order of the Court" if Pappadio answered the questions before his sentence expired or the grand jury was discharged, whichever first occurred.

Pappadio's principal challenge to his conviction is that he was privileged not to answer the questions, despite the grant of immunity under §1406. Three grounds are put forward for the claimed privilege. The first is that he is under indictment for alleged violation of the federal narcotics laws. The likelihood that Pappadio will now be prosecuted under this indictment, which was filed in 1958, appears not to be great; seventeen of the thirty-seven defendants named in the indictment were tried and convicted in 1959, see *United States v. Aviles*, 274 F. 2d 179 (2 Cir.), cert. denied, 362 U. S. 974 (1960), but we are informed that Pappadio's name has not even appeared on the trial [fol. 244] calendar since 1958. Moreover, the meetings as to which Pappadio was questioned took place in 1963 or later,² over six years after the most recent act alleged in the 1958 indictment.

In any event, Pappadio suggests no way in which the pendency of the 1958 indictment renders the immunity granted under §1406 insufficient to protect him from being incriminated by his answers. Pappadio does point out, correctly, that the immunity does not bar the government from prosecuting him under the indictment or for perjury in the testimony he may give before the grand jury. The danger of such prosecutions is something different than the danger of self-incrimination, however, and the protection of §1406—like that of the constitutional privilege which it replaces—is directed only at the latter. Section 1406 does effectively

² Pappadio was questioned as to meetings which occurred subsequent to commencement of proceedings before the grand jury, which was impaneled in September 1963.

protect the witness from being prejudiced in any criminal proceeding as a result of his answers; it creates a defense to prosecution for acts as to which he is compelled to testify, and it bars the use of such testimony against him in a prosecution for any other acts.³

If Pappadio is required to give any testimony relating to the matters charged in the 1958 indictment, in response either to the questions now at issue or to subsequent questions, he could then move to have the indictment dismissed [fol. 245] as to himself. And even if his answers are not ~~such~~ as to entitle him to dismissal of the indictment, he is protected against the answers being used against him in any criminal proceeding, including one under the pending indictment.

It appears to be Pappadio's position, however, that protection against self-incrimination is insufficient in this case because the privilege not to testify before a grand jury while under indictment is part of the privilege of a criminal defendant not to testify at trial, a privilege which goes beyond the privilege against self-incrimination. See *Piemonte v. United States*, 367 U. S. 556, 565 (1961) (Douglas, J., dissenting). The legitimate interests of a witness before a grand jury, even a witness under indictment, would seem to be sufficiently protected by the privilege against self-incrimination. And, apart from the *Piemonte* dissent, we find no authority for also extending to such a witness the privilege not to testify at all, even where given immunity.

The second and third grounds offered for the claim of privilege are that the requested facts are protected by the attorney-client privilege and that the questions interfere

³ By its express terms, §1406 does not protect a witness from prosecution for perjury committed while testifying under that section's compulsion. Such a limitation has been held not to make a statutory grant of immunity an inadequate substitute for the Fifth Amendment privilege. *Glickstein v. United States*, 222 U. S. 139 (1911). The theory of *Glickstein* is that the Fifth Amendment protects only against self-incrimination with respect to past acts, not with respect to the testimony being given.

with the right to effective representation by counsel guaranteed by the Sixth Amendment. The factual premise for both grounds is Pappadio's allegation that the meetings were with counsel and witnesses in connection with the 1958 indictment and a possible prosecution for perjury.

Since the policies served by the attorney-client privilege go beyond protection against self-incrimination, the privilege is not destroyed by a grant of immunity from prosecution. See Note, 72 Yale L. J. 1568, 1578 (1963). Pappadio's reliance on the privilege in this case is misplaced, however. [fol. 246] On the present record we cannot determine whether the privilege could properly be asserted even with respect to the subject matter of the meetings. In any event, the grand jury has not inquired into the subject matter of the meetings, and the questions which it has asked—who was present; where did the meetings take place; who arranged them—have not touched on matters meriting the protection of the privilege. See *Colton v. United States*, 306 F. 2d 633 (2 Cir. 1962), cert. denied, 371 U. S. 951 (1963). For the same reason, the questions have in no way interfered with Pappadio's right to effective representation by counsel. Compare *Coplon v. United States*, 191 F. 2d 749 (D. C. Cir. 1951), cert. denied, 342 U. S. 926 (1952).

Pappadio also objects to his sentence. He contends that the penalty imposed for criminal contempt after only a summary trial is constitutionally limited to that provided for petty offenses. See *United States v. Barnett*, 376 U. S. 681, 695 n. 12 (1964). Read literally, the *Barnett* dictum does indeed stand for such a rule, and it appears to have been so interpreted by a majority of a panel of the Court of Appeals for the District of Columbia. See *Rollerson v. United States*, No. 17675, October 1, 1964 (2-1 decision). However, we adhere to our prior decisions, which have interpreted the *Barnett* dictum as not applying where the contempt is committed in the presence of the court and it remains possible for the defendant to comply with the court's order at the time that the contempt proceedings are begun. See *United States v. Shillitani*, No. 29117, May 18,

1965; *United States v. Tramunti*, No. 29387, April 5, 1965; *United States v. Castaldi*, 338 F. 2d 883, 885, petition for cert. filed, 33 U. S. L. Week 3223 (Dec. 17, 1964); *United States v. Harris*, 334 F. 2d 460, 463, cert. granted, 379 U. S. 944 (1964).

[fol. 247] We have considered Pappadic's contention that the questions were not shown to be relevant to the grand jury's inquiry, and we find it to be without merit.

The judgment of the district court is affirmed.

MEDINA, Circuit Judge (concurring and in part dissenting):

I agree with my brothers of the majority on all points except the sentence to a period of two years imprisonment. This, in my opinion, is too much. We have held that this Court has power to reduce the period of imprisonment meted out for a contempt of court, see *United States v. Levine*, 1961, 288 F. 2d 272, applying the unambiguous mandate of *Brown v. United States*, 1959, 359 U. S. 41, 52, and I would reduce appellant's sentence to one year instead of two. I realize that this Court has upheld sentences of two years in similar cases, but I wish to register my dissent.

[fol. 248]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon.
Harold R. Medina, Hon. Thurgood Marshall, Circuit
Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ANDIMO PAPPADIO, Defendant-Appellant.

JUDGMENT—May 24, 1965

Appeal from the United States District Court for the
Southern District of New York.

This cause came on to be heard on the transcript of rec-
ord from the United States District Court for the Southern
District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, ad-
judged, and decreed that the order of said District Court
be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 249]

[File endorsement omitted]

[fol. 250] PETITION FOR REHEARING EN BANC AND MOTION
TO STAY THE MANDATE covering 15 pages filed June 4, 1965
omitted from this print.

[fol. 263]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title omitted]

ORDER ON PETITION FOR REHEARING AND MOTION TO STAY
ISSUANCE OF MANDATE PENDING APPLICATION FOR A WRIT
OF CERTIORARI TO THE SUPREME COURT OF THE UNITED
STATES—June 21, 1965

Lauritano, Schlacter & Schneider, New York, N. Y.,
for appellant.

The motion for rehearing is denied.

The motion to stay our mandate is granted, subject to
the conditions of our Rule 28(c).

J. E. L., H. R. M., T. M., U.S.C.JJ.

Jun 21 1965.

[fol. 264]

[File endorsement omitted]

[fol. 267]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING IN BANC—
June 21, 1965

Lauritano, Schlacter & Schneider, New York, N. Y.,
for appellant.

As no active circuit judge has requested that this case be
reheard in banc, and as Judge Medina, who is qualified to

vote thereon by virtue of 28 U. S. C. § 43 votes to deny, the petition is denied.

J. Edward Lumbard, Chief Judge.

Jun 21 1965.

[fol. 268] [File endorsement omitted]

[fol. 271] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 272]

SUPREME COURT OF THE UNITED STATES

No., October Term, 1965

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—July 6, 1965

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 19th, 1965.

John M. Harlan, Associate Justice of the Supreme Court of the United States.

Dated this 6th day of July, 1965.

[fol. 273]

SUPREME COURT OF THE UNITED STATES

No. 442—October Term, 1965

ANDIMO PAPPADIO, Petitioner,

v.

UNITED STATES.

ORDER ALLOWING CERTIORARI—November 15, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to Questions 1, 2 and 3, presented by the petition which read as follows:

"1. Whether petitioner should have been granted a trial by jury on a charge of criminal contempt of court where he has been sentenced to two years' imprisonment.

"2. Whether the District Court could legally sentence petitioner to two years' imprisonment for contempt of court following a non-jury hearing under Rule 42(b) of the Federal Rules of Criminal Procedure.

"3. Whether, assuming *arguendo* that a sentence of two years may be imposed for criminal contempt without a trial by jury, there was an abuse of discretion in sentencing petitioner to two years' imprisonment for refusing to answer five questions where he had answered more than one hundred questions."

The case is placed on the summary calendar and set for argument immediately following No. 412.

[fol. 274] And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

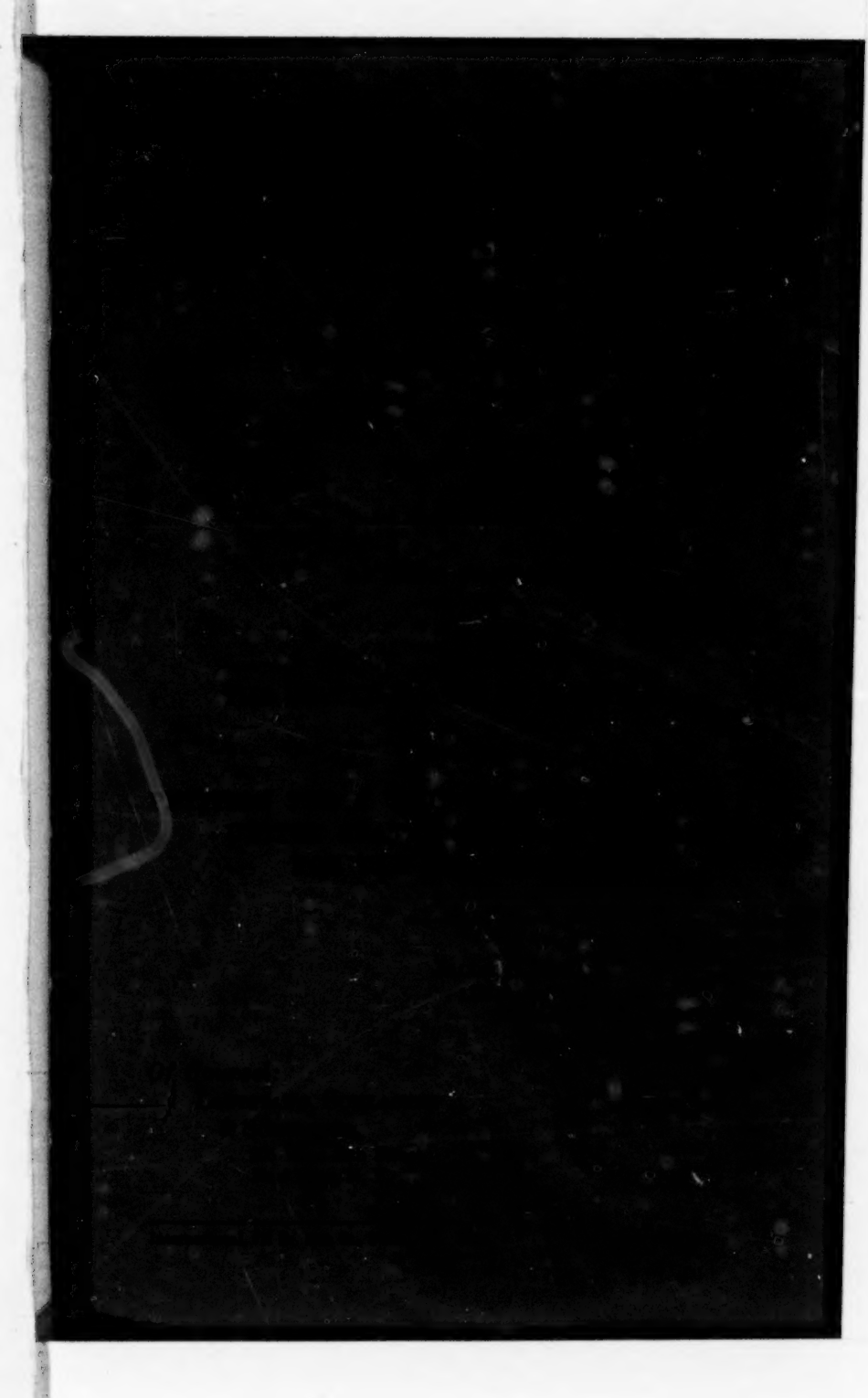


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IN THE
Supreme Court of the United States.

—
OCTOBER TERM, 1965.
—

No. — .
—

ANDIMO PAPPADIO,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

—
**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT.**

Andimo Pappadio, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 24, 1965.

OPINIONS BELOW.

The opinions and dissenting opinion in the courts below (Appendix A(1) and (2), *infra*, pp. 23-35) are reported at 235 F. Supp. 887 and 346 F. 2d 5.

JURISDICTION.

The judgment of the court below (Appendix B, *infra*, pp. 36-37) was entered on May 24, 1964. A timely petition for rehearing and for rehearing en banc was denied on June 21, 1965 (Appendix C, *infra*, pp. 38-39). On July 6, 1965, Mr. Justice Harlan granted an extension of time, to and including August 19, 1965, for filing a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether petitioner should have been granted a trial by jury on a charge of criminal contempt of court where he has been sentenced to two years' imprisonment.

2. Whether the District Court could legally sentence petitioner to two years' imprisonment for contempt of court following a non-jury hearing under Rule 42(b) of the Federal Rules of Criminal Procedure.

3. Whether, assuming *arguendo* that a sentence of two years may be imposed for criminal contempt without a trial by jury, there was an abuse of discretion in sentencing petitioner to two years' imprisonment for refusing to answer five questions where he had answered more than one hundred questions.

4. Whether a grand jury witness, under indictment charging violation of the narcotics laws, may be held in contempt of court for refusing to testify, after he had been granted immunity under 18 U. S. C. § 1406, before a federal grand jury investigating violations of the narcotics laws.

5. Whether a grand jury witness, having unconditionally testified to non-involvement with a group allegedly engaged in illegal narcotics activity, having thus contradicted under oath evidence said to be in the hands of the Government, thereby becoming subject to the peril of a perjury prosecution, has a privilege under the Fifth Amendment to refuse to answer questions about his relationship with the alleged leader of that group.

6. Whether a grand jury witness, who is already under indictment charging violation of the narcotics laws, and who is further subject to perjury prosecution by virtue of

testimony given before the grand jury, may refuse to answer questions concerning his conferences with attorneys, notwithstanding that he had been granted immunity under 18 U. S. C. § 1406, on the ground of the First Amendment right to silence and freedom of association and the Sixth Amendment guarantee of effective assistance of counsel.

7. Whether the immunity statute, 18 U. S. C. § 1406, was unconstitutional as applied to the petitioner since it was not, as to him, a replacement of his Fifth Amendment rights.

8. Whether a grand jury witness, who, after a grant of immunity under 18 U. S. C. § 1406, has answered every question asked of him relating to narcotics, may properly be convicted of contempt of court for refusing to answer other questions not shown to be relevant or pertinent to the subject under inquiry before the grand jury, nor to the provisions of the statute under which immunity was conferred.

**CONSTITUTIONAL PROVISIONS, STATUTE AND
RULE INVOLVED.**

Constitution of the United States:

The First Amendment provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U. S. C. 1406 provides:

Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), or

(3) the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a), is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section. Added July 18, 1956, c. 629, Title II, § 201, 70 Stat. 574.

Federal Rule of Criminal Procedure involved:

Rule 42 of F. R. Crim. P. provides:

• • •

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT.

This is a criminal contempt case, arising out of the refusal of petitioner to answer some of the questions put to him before a federal grand jury investigating possible narcotics offenses.

At the time of his appearances before the grand jury, petitioner was under federal indictment in that same district for violation of the narcotics laws (61a).¹ Flatly contradicting information allegedly in the hands of the Government (59a-60a, 173a-174a), petitioner unequivocally denied any involvement as an individual or as a member of a group in unlawful narcotics activities (174a-175a, 214a).

The case arises from a grand jury investigation in the United States District Court for the Southern District of New York. The grand jury was impaneled in September 1963, and subsequently began an investigation into possible violation of the Federal Narcotics Laws, referred to in 18 U. S. C. § 1406. On his first three appearances before the grand jury, petitioner refused to testify on the ground of self-incrimination. There was then pending in the Southern District of New York an indictment against petitioner, returned in 1958, charging him with conspiracy to violate the narcotics laws (11a).

The Government, without moving to dismiss the indictment, which is still pending, undertook to have petitioner granted immunity, pursuant to § 1406, for any transaction or matter about which he was compelled to testify. Statutory immunity was granted (116a).

Thereafter, petitioner again appeared before the grand jury and testified. In the course of interrogation, the prosecutor put a carefully prepared question:

1. References to figures with the suffix "a" are to the printed appendix filed in the court below. Nine copies of the appendix have been lodged with the Clerk of this Court.

“So that you’ll have a better appreciation of the purpose of this Grand Jury proceeding, I want to advise you that there’s been testimony before a Senate committee and statements have been made to Federal law enforcement agencies that a person named Thomas Lucchese is at the head of a group of people that are engaged in a number of illegal activities. It has been alleged that one of these alleged illegal activities is the illicit narcotics traffic. It’s also been alleged, sir, that you are a member of this particular group—

“Now, what we’re attempting to do is to find out whether or not these allegations are true or false. Are these allegations true?” (174a-175a)

Petitioner responded:

“I am not a member of this group if they exist I have no knowledge if there is a group. I do not deal in narcotics. I do not know if Mr. Lucchese deals in narcotics and I do not know if anybody else in this room or out of this room is dealing with narcotics.” (175a)

The Government also asked petitioner before the grand jury the following questions:

“Q. Mr. Pappadio, I’m now going to ask you some of the questions that Judge Herlands directed you to answer the time you were before him prior to today. The first one is this Mr. Pappadio—At the narcotics trial of Vito Genovese there was testimony that you attended a meeting at the home of Rocco Mazzie. Did you attend this meeting?” [Petitioner answered, “No, sir.”]

“Q. Do you know of such a meeting?” [He answered, “No, sir.”] “Q. “Do you know Rocco Mazzie?” [Petitioner answered, “No, sir.”] (214a)

Petitioner thus flatly denied, under oath, subject to the pains of a perjury prosecution, statements which he had been told were given to the Government. Petitioner denied, unconditionally, any knowledge about or complicity in illegal narcotics activities, the sole subject under investigation by the grand jury.

Petitioner answered other questions put to him, until the prosecutor began to inquire about conferences between petitioner and attorneys (178a). When petitioner declined to answer, the machinery was set in motion for a contempt proceeding.

After some further questioning had elicited the fact that petitioner knew Thomas Lucchese, and had previous contact with him, the prosecutor began to inquire about conferences where Lucchese, petitioner, attorneys and other persons had been present (178a). Petitioner refused to answer, relying at first on the attorney-client privilege (178a-183a). Later, having consulted with counsel, he expanded his objection to the First, Fifth, and Sixth Amendments (183a-189a). The district court directed petitioner to answer the questions (203a-209a). After the district judge had withdrawn, petitioner again declined to testify about his meetings with counsel² (210a-212a).

On the following day, the Government moved for an order that petitioner show cause why he should not be held in contempt (4a-6a). The order was issued (3a), and

2. Five questions were unanswered; they were:

(1) "Mr. Pappadio, who were the attorneys who were present at these meetings?" (210a);

(2) "Aside from the meetings which you described, which took place on the street, where else did you meet with Lucchese?" (210a);

(3) "Who else was present at these meetings besides yourself, Lucchese and the attorneys?" (210a);

(4) "All right; how many of such meetings were there?" (211a);

(5) "Where did the meetings take place?" (212a).

It is relevant to note that, with respect to the fourth question, petitioner did answer at an earlier stage (178a).

the matter came on for hearing before William B. Herlands, D. J. Petitioner's sworn answer (7a-10a) recited the pending indictment outstanding against him and, further, the assertion by counsel for the Government that they had received information that petitioner was a member of a group engaged in illegal narcotics traffic. The answer pointed to petitioner's unequivocal denial of these charges before the grand jury and averred that petitioner has been and is in consultation with attorneys and prospective witnesses with respect to the indictment:

"To answer the questions put to him before the Grand Jury would result in the disclosure to the Government of matters of defense, as well as matters within his privilege of confidence between client and attorney. To answer such questions would result in interference with and impairment of his right to defend himself and the effective assistance of counsel." (9a)

The answer also indicated that petitioner had consulted with attorneys on the possible perjury proceedings that might be brought as a result of his testimony.

The answer further stated that petitioner was aware and believed that he has been the subject of surveillance, including electronic eavesdropping, by Federal and local officials. Additional surveillance with respect to his attorneys and witnesses would substantially impair and prejudice his ability to defend himself (9a).

In addition to matters of privilege, the answer asserted that the questions he had declined to answer were not pertinent to the subject under inquiry by the grand jury. The subject had not only been announced to petitioner, but it had been the basis upon which the order granting immunity under § 1406 had been obtained.

A hearing was had before the district court on October 28, 1964. At the outset a motion for a jury trial was made and denied (34a). The Government stipulated that

an indictment is now pending in the United States District Court for the Southern District of New York against the defendant for violation of the narcotics laws (61a). The Government further stipulated that it has statements to the effect that the petitioner was involved as a member of a group engaged in illegal activities and that there was testimony in a case that the defendant was involved in narcotics (59a-60a).

The assistant United States Attorney told the district court that the outstanding indictment against petitioner was not on the trial calendar, since with respect to the other defendants who did stand trial the case was still in the appellate courts (62a). The petitioner had been severed from that trial (60a). The Government stated that "the case is not presently on the trial calendar" (61a).

At the hearing counsel for the petitioner argued that since the petitioner had answered many questions and only refused to answer five questions that fact was relevant to the issue of willfulness (54a); that the questions asked of the petitioner were not material and relevant (55a); that he was facing a prosecution for perjury (56a-57a) for which he has no immunity.

The petitioner placed into evidence the outstanding indictment against him (11a-20a, 60a), as well as the transcript of the testimony of the trial where there was testimony by a witness for the Government stating that he was present at the meeting (21a-32a, 59a-60a).

Counsel for petitioner further argued that requiring petitioner to answer these questions involving or relating to meetings with attorneys and the persons present at these meetings violates his rights under the First and Sixth Amendments.

Counsel for petitioner had argued that the Government had no right to call petitioner as a witness before the Grand Jury since he was under indictment (139a-142a). The district court ruled that this argument was without merit (142a-144a).

The district court took the matter under advisement and adjourned the hearing until October 30, 1964. On that date, the petitioner was adjudged guilty of criminal contempt of court and sentenced to a term of imprisonment of two years. The sentence further provided that if the petitioner answer the questions as directed prior to expiration of the sentence or discharge of the grand jury, whichever first occurs, further application may be made to the court to reconsider the sentence (76a, 78a). This grand jury was discharged in March of 1965.

The court below said (Appendix A(1), *infra*, pp. 26-27):

"The likelihood that Pappadio will now be prosecuted under this indictment, which was filed in 1958 appears not to be great; . . . we are informed that Pappadio's name has not even appeared on the trial calendar since 1958. . . ."

"In any event, Pappadio suggests no way in which the dependency of the 1958 indictment renders the immunity granted under § 1406 insufficient to protect him from being incriminated by his answers. Pappadio does point out, correctly, that the immunity does not bar the government from prosecuting him under the indictment or for perjury in the testimony he may give before the grand jury. The danger of such prosecutions is something different than the danger of self-incrimination, however, and the protection of § 1406—like that of the constitutional privilege which it replaces—is directed only at the latter."

The court below further said:

"The legitimate interests of a witness before a grand jury, even a witness under indictment, would seem to be sufficiently protected by the privilege against self-incrimination." (Appendix A(1), *infra*, pp. 27-28)

The court below held that the attorney-client privilege and the Sixth Amendment were here not sufficient to justify a refusal to answer these five questions even though petitioner alleged that the meetings were with counsel and witnesses in connection with the 1958 indictment and a possible prosecution for perjury. The court below dismissed petitioner's contention that the questions were not relevant to the grand jury's inquiry.

The court below did not adopt petitioner's contentions that the First Amendment was a further bar to these particular questions and that the immunity statute as applied in this case was no replacement of the Fifth Amendment.

The majority of the court below sustained the sentence of two years for criminal contempt stating that the "*Barrett* dictum" does not apply where the contempt is committed in the presence of the court and it remains possible for the defendant to comply with the court's order at the time that the contempt proceedings are begun. Judge Medina agreed with the majority on all points except that the sentence to a period of two years' imprisonment was in his opinion "too much." (Appendix A(1), *infra*, p. 29)

REASONS FOR GRANTING THE WRIT.

1. This case is closely parallel to *Harris v. United States*, No. 6, October Term, 1965, in which this Court granted certiorari on December 14, 1964. There are, however, differences between the two cases, and together they permit a fuller examination by the Court of the contempt power than would either case alone. Both present the important questions whether trial by jury is guaranteed to persons charged with criminal contempt and whether a sentence in excess of that permitted for petty offenses can be imposed, where a jury trial has been denied. The *Harris* case arises in the context of a summary proceeding under Rule 42(a) of the Federal Rules of Criminal Procedure. In this case, Rule 42(b) was invoked. The difference in procedure is reflective of the fact that Harris's refusal to answer occurred in the presence of the district judge, whereas the court was absent during the interrogation of the petitioner in this case. The two thus provide companion situations of fact, complementing and supplementing each other.

This Court will certainly not wish to dispose of the present case in advance of decision in *Harris v. United States*, *supra*. Even if none of the additional facets of this case, nor the separate questions presented here and not in *Harris*, are deemed worthy of plenary review by this Court, the final resolution of this case is interlocked with and dependent upon the ruling in *Harris*.

We further submit that there was an abuse of power in sentencing petitioner to two years' imprisonment since this petitioner had answered literally scores of questions (170a-184a). If witnesses called before the Grand Jury are to receive the same severe maximum sentences whether they refuse to answer any questions, as is quite frequent, or whether they have cooperated 99%, witnesses in the future may be reluctant to cooperate where no consideration is given for answering practically every question asked.

As this Court stated in *Green v. United States*, 356 U. S. 165, 188 (1958),

“[I]n the areas where Congress has not seen fit to impose limitations on the sentencing power for contempts the district courts have a special duty to exercise such an extraordinary power with the utmost sense of responsibility and circumspection. The ‘discretion’ to punish vested in the District Courts . . . is not an unbridled discretion. Appellate courts have here a special responsibility for determining that the power is not abused, to be exercised if necessary by revising themselves the sentences imposed.”

2. Important new questions of the constitutionality of compelled testimony, under the guise of an immunity statute, are presented in this case. The validity of the Narcotic Control Act of 1956, 18 U. S. C. § 1406, has been before this Court in two prior proceedings: *Reina v. United States*, 364 U. S. 507 (1960); *Piemonte v. United States*, 367 U. S. 556 (1961). While in both instances the Court upheld the statute, in neither case was the petitioner under a pending indictment at the time the Government sought to force him to testify. Two Justices of this Court dissented in *Piemonte* because the witness was indicted *after* he had been sentenced for contempt, and even though the indictment had been dismissed before review in this Court. Petitioner in this case presents the basic question whether the immunity granted by § 1406 deprives him of his right not to take the stand in a criminal proceeding.

The court below tried to circumvent the fact that the witness before the grand jury was also a defendant in a pending criminal case. Prognosticating, the court below tried to ignore the indictment as somewhat stale:

“The likelihood that Pappadio will now be prosecuted under this indictment, which was filed in 1958, appears

not to be great; seventeen of the thirty-seven defendants named in the indictment were tried and convicted in 1959, see *United States v. Aviles*, 274 F. 2d 179 (2 Cir.), cert. denied, 362 U. S. 974 (1960), but we are informed that Pappadio's name has not even appeared on the trial calendar since 1958." (Appendix A(1), p. 26, *infra*.)

Nice calculations about the probability and possibility of prosecution do not make the indictment disappear. The Government was actively prosecuting other defendants under it. See *United States v. Aviles*, 337 F. 2d 552, cert. denied, 380 U. S. 906 (March 1, 1965). The Government had not and has not moved to dismiss the indictment against petitioner, who had and has grounds to believe that he may be tried.³

Verbal cosmetics will not disguise the fact that the Government here sought to compel a defendant, facing a live indictment, to testify in a criminal proceeding. Whether this is in accord with the Constitution of the United States, or whether it ought to be tolerated by this Court under its supervisory power over the administration of justice in the federal courts, presents a question which has not been and which ought to be decided by this Court.

3. This case presents the significant question whether a grant of immunity under statutes like 18 U. S. C. § 1406 displaces constitutional rights and privileges other than the privilege against self-incrimination. Petitioner here refused to answer certain questions that related to his defense of a pending criminal indictment. To compel him to answer would be, in effect, to compel him to take the stand in a criminal case, contrary to the Fifth Amendment. The

3. The court below was informed, in the oral argument November 18, 1964, by the Government, that one of the reasons why Pappadio's name had not appeared on the trial calendar was because the second *United States v. Aviles* case, *supra*, had not yet been finally terminated (Petitioner's Pet. for Rehearing p. 4).

questions were directed at petitioner's conferences with attorneys, an area protected by the Sixth Amendment guarantee of right to counsel. Petitioner further urged his First Amendment privilege of silence and freedom of association.

These are not inconsequential claims of constitutional privilege. While this Court held in *Reina v. United States*, *supra*, that the immunity under § 1406 was broad enough to encompass the privilege against self-incrimination, the right of a defendant not to testify is a broader right than the self-incrimination privilege.⁴ Mr. Justice Douglas explicitly pointed to that larger scope of protection in *Piemonte v. United States*, *supra*, at 566:

"His right not to take the stand in a federal criminal trial transcends his privilege against self-incrimination. No immunity statute, no pressure of government, no threats of the prosecution can be used to deprive the citizen of this right."

Petitioner's effort to screen off from the Government his relationship with counsel certainly raises significant issues. The Government and the court below only address themselves to the common-law attorney-client privilege, but petitioner's claim is deeper than that. Although he initially objected to the inquiries on that ground, after consultation with his lawyer, petitioner rested his refusal to answer upon the broader ground of the Sixth Amendment right to effective assistance of counsel. Petitioner's view that this right was in jeopardy is not unreasonable or imaginary. Were the Government to find out, for example, who was present at such conferences, they might seek to induce or compel such persons to disclose the substance of the discussions. If the persons present were potential de-

4. Even under the privilege against self-incrimination, petitioner has a stronger position than *Reina*. The immunity statute does not bar prosecution, but merely bars use of the compelled testimony. Since petitioner was already under indictment, his need for protection was correspondingly greater.

fense witnesses to the charges in the indictment, the Government would have effectuated pre-trial discovery, in a criminal case, unauthorized if sought directly.

Petitioner's real concern about disclosure of the time and place of his meetings with attorneys derives from the not fanciful fear that the Government was utilizing clandestine surveillance and electronic eavesdropping devices. The reality of this fear was only recently reinforced by the concession of the Internal Revenue Service that it conducts schools to train its agents for what many hold to be scandalous activities. See, e.g., *New York Times*, July 15, 1965, p. 17.

The court below, in a strange non-sequitur, noted that the meetings as to which petitioner was questioned took place in 1963 or later, "over six years after the most recent act alleged in the 1958 indictment" (Appendix A(1), *infra*, at p. 26). It is, of course, not unnatural that the commencement of the grand jury investigation in 1963 on possible narcotics offenses would precipitate more urgent concern on the part of an indicted defendant as to the direction and course of his defense to the outstanding charges and the possible impact of the grand jury proceedings upon those charges.

That the duty to testify is not coextensive with the possible range of government inquiry, is a recognition of values which override government interests in obtaining information. ". . . Immunity acts are useful only to compel testimony protected by the fifth Amendment; a grant of immunity cannot be used to compel the testimony of a witness who bases his refusal to testify either on another evidentiary privilege or on his first Amendment right to silence." Comment, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L. J. 1568, 1578 (1963). (Footnote omitted.)

The truth of these propositions is meaningfully challenged by the prosecution in this case. Such challenge justifies invocation of this Court's power to grant the writ of certiorari.

4. Petitioner's concern that he not be maneuvered into a perjury prosecution, through the application of an immunity statute, presents a question important to the administration of criminal law. As do other immunity acts, § 1406 specifically provides that a witness is not exempt from prosecution for perjury while giving testimony under the compulsion of the statute. With the prospect of an indictment for perjury in the background, under the circumstances of this case a correlative privilege against self-incrimination must also arise.

To illustrate in this case, petitioner had testified under compulsion that he was not involved in illegal narcotic activities alone or as a member of a group headed by Thomas Lucchese. The Government indicated on the record that it had evidence to the contrary. Out of this conflict, a charge of perjury was not fanciful. The Government pressed, nonetheless, for petitioner to give testimony about meetings he had attended with Lucchese. Even though such meetings may have been entirely innocent, others might interpret the circumstances differently. "[A] witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Slochower v. Board of Education*, 350 U. S. 551, 557-558 (1956); see *Grunewald v. United States*, 353 U. S. 391, 421 (1957). Petitioner might reasonably fear that further testimony about conferences with Lucchese would ensnare him in perjury prosecution, which, though unfounded, was nonetheless real.

The immunity statute, § 1406, in no way prevents a witness from being whipsawed into such an unfavorable position. The witness who truthfully testifies in contradiction to information in the possession of the Government has the primary reason for concern. The scope of protection afforded to such a witness by the due process clause of the Fifth Amendment as well as the self-incrimination clause is an important question that this Court ought to decide.

5. Finally, this case poses the significant question of the limitations of pertinence to the subject matter that circumscribe interrogation of a witness compelled to testify under grant of statutory immunity. The issue has dimensions of constitutional law as well as statutory interpretation.

In dealing with investigating committees of the Congress, this Court has laid down elementary rules of pertinency for the protection of witnesses. *Deutch v. United States*, 367 U. S. 456 (1961); *Watkins v. United States*, 354 U. S. 178 (1957). As the opinions of the Court have declared, the requirements are derived in part from the Due Process Clause of the Fifth Amendment. *Watkins* and *Deutch* both held that:

“Unless the subject matter has been made to appear with undisputable clarity, it is the duty of the investigative body, upon objection of the witness on grounds of pertinency, to state for the record the subject under inquiry at that time and the manner in which the propounded questions are pertinent thereto.”

354 U. S. at 214-215; 367 U. S. at 468.

This constitutional requirement of legislative committees is surely applicable with equal or greater force to a grand jury investigation.

In the court below, the Government argued that *Watkins* is inapposite because “the legislative powers of congressional committees are limited by considerations of legislative purpose. The scope of a grand jury inquiry is not similarly restricted.” Brief for the United States, p. 15. The contention that legislative investigations are inherently more limited in scope than grand jury inquiries is without foundation. Both have broad ranging powers, and it is the breadth that underlies the requirement, applicable to both, that they proceed in a regularized manner in extracting information from unwilling witnesses.

The proceedings in this case do not meet the constitutional requirements of *Watkins* and *Deutch*. The Govern-

ment concedes as much in its spurious attempt to distinguish the legislative investigation cases. It remains for this Court to hold expressly that the requirements of both types of investigation rest on the same constitutional footing.

The statutory aspect to the requirement of pertinency derives from the limited scope of the immunity act, § 1406. Congress has not seen fit to enact a general immunity statute. Rather it has passed a long series of specific acts, confined to particular areas. Over forty acts can now be found in the United States Code. See Comment, 72 Yale L. J. 1568, 1611-1612 (1963). Where one of these statutes is invoked, it would be a perversion of the legislative pattern not to confine the inquiry to the area contemplated by the Congress in authorizing immunity. Petitioner's objection to the pertinency of the questions put to him was not met. He is entitled to refuse to answer questions that are not pertinent, under the Constitution and under § 1406. There is thus presented a fundamental question which this Court most appropriately should consider.

CONCLUSION.

For the foregoing reasons, petitioner respectfully prays that this Court issue a writ of certiorari to review the judgment of the court below.

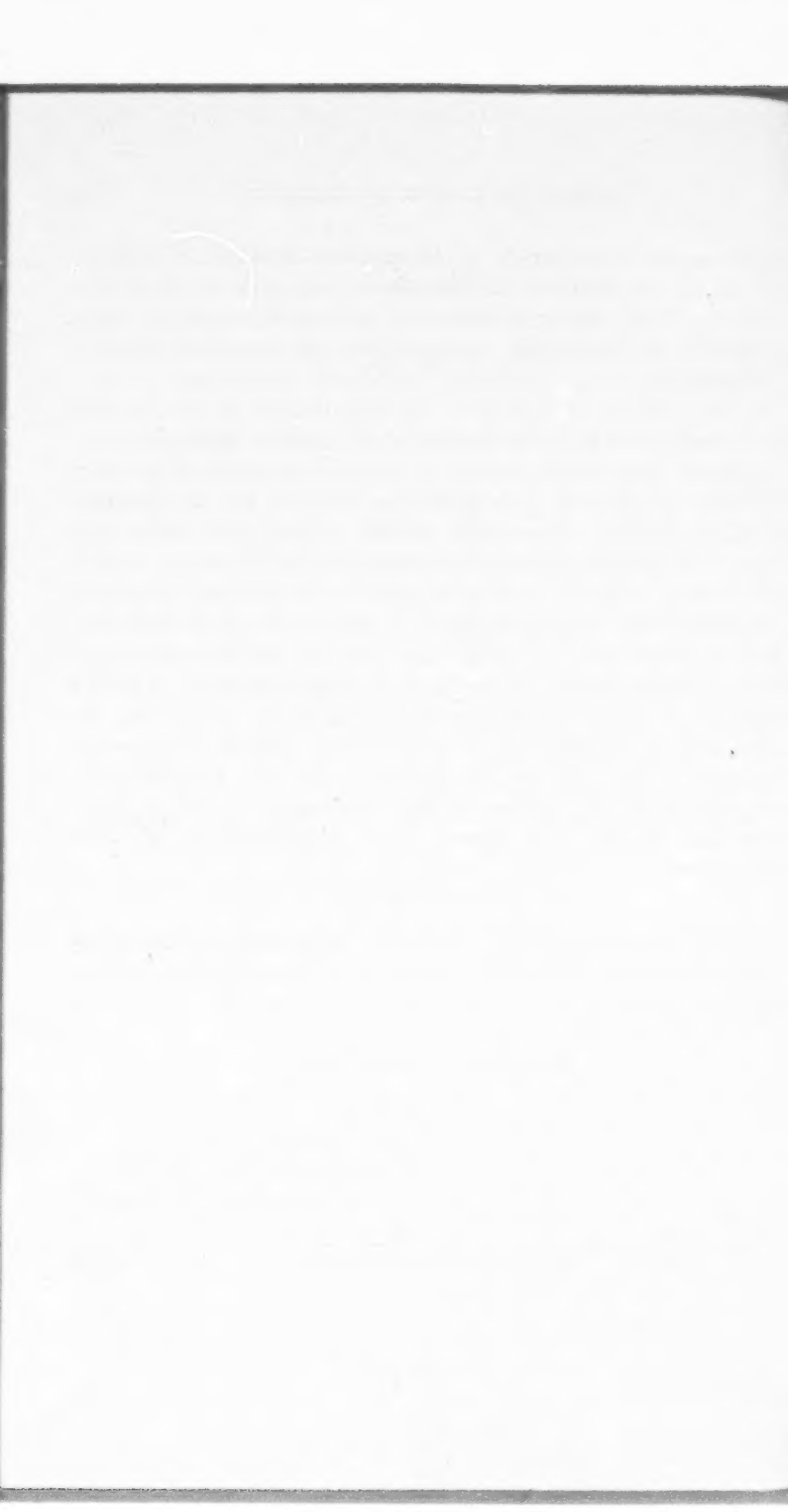
Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107,
Counsel for Petitioner.

Of Counsel:

LAURITANO, SCHLACTER & SCHNEIDER,
205 West 34th Street,
New York, N. Y.

August, 1965.



APPENDIX A(1).

OPINIONS BELOW.

Opinion of the United States Court of Appeals.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

No. 248—September Term, 1964.

(Argued November 18, 1964 Decided May 24, 1965.)

Docket No. 29298

UNITED STATES OF AMERICA,

Appellee,

v.

ANDIMO PAPPADIO,

Defendant-Appellant.

Before :

LUMBARD, Chief Judge,

MEDINA and MARSHALL, Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, William B. Herlands, *J.*, which adjudged the appellant guilty of contempt for his refusal to answer questions before a federal grand jury.

Affirmed.

JOHN E. SPRIZZO, Assistant United States Attorney, New York, N. Y. (Robert M. Morgenthau, United States Attorney for the Southern District of New York, and John S. Martin, Jr., Assistant United States Attorney, New York, N. Y., on the brief), *for appellee.*

MAURICE EDELBAUM, New York, N. Y. (Philip R. Edelbaum and Lauritano, Schlacter & Schneider, New York, N. Y., and Jacob Kossman, Philadelphia, Pa., on the brief), *for defendant-appellant.*

LUMBARD, *Chief Judge:*

Andimo Pappadio appeals from a conviction for contempt for refusing to answer five of the questions put to him by a federal grand jury sitting in the Southern District of New York. We find the conviction and sentence to be proper, and we affirm the judgment of the district court.

As part of the grand jury's inquiry into alleged violations of the federal narcotics laws, it had Pappadio summoned before it. On February 14, 1964 and again on April 24 and May 8, he was asked numerous questions, but he gave only his name and some other biographical information; he refused to answer the other questions on the ground that his answers would tend to incriminate him.

On the government's application, Judge MacMahon on August 4, 1964 issued an order under 18 U. S. C. § 1406,¹

1. "§ 1406. Immunity of witnesses

"Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United States involving any violation of—

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), or

which directed Pappadio to testify and granted him immunity from prosecution with respect to such testimony. However, Pappadio again refused to testify when he appeared before the grand jury later that day and on October 6. (At these and earlier appearances he sometimes cited the First Amendment as well as the Fifth.)

On October 8, Judge Herlands specifically ordered Pappadio to answer the grand jury's questions, and Pappadio did answer some questions the following day. But he refused to give any information concerning his meetings with Tommy Lucchese and, it appears, one or more lawyers. He based his refusal principally on the attorney-client privilege but also on the First, Fifth and Sixth Amendments.

After a hearing before Judge Herlands, who found his claim of privilege to be without merit, Pappadio answered questions as to the duration and time of day of the meetings. However, he still refused to answer five of the questions, and these are the questions at issue on this appeal:

"Mr. Pappadio, who are the attorneys who were present at these meetings?"

(3) the Act of July 11, 1941, as amended (21 U. S. C., sec. 184a), is necessary to the public interest, he upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

"Aside from the meetings which you described, which took place in the street, where else did you meet with Lucchese?"

"Who else was present at these meetings besides yourself, Lucchese and the attorneys?"

"All right. How many of such meetings were there?"

"Where did the meetings take place?"

A hearing pursuant to Rule 42(b) of the Federal Rules of Criminal Procedure was held on October 28 and 30. Judge Herlands found Pappadio guilty of contempt and sentenced him to imprisonment for two years or "until further order of the Court" if Pappadio answered the questions before his sentence expired or the grand jury was discharged, whichever first occurred.

Pappadio's principal challenge to his conviction is that he was privileged not to answer the questions, despite the grant of immunity under § 1406. Three grounds are put forward for the claimed privilege. The first is that he is under indictment for alleged violation of the federal narcotics laws. The likelihood that Pappadio will now be prosecuted under this indictment, which was filed in 1958, appears not to be great; seventeen of the thirty-seven defendants named in the indictment were tried and convicted in 1959, see *United States v. Aviles*, 274 F. 2d 179 (2 Cir.), cert. denied, 362 U. S. 974 (1960), but we are informed that Pappadio's name has not even appeared on the trial calendar since 1958. Moreover, the meetings as to which Pappadio was questioned took place in 1963 or later,² over six years after the most recent act alleged in the 1958 indictment.

In any event, Pappadio suggests no way in which the pendency of the 1958 indictment renders the immunity granted under § 1406 insufficient to protect him from being

2. Pappadio was questioned as to meetings which occurred subsequent to commencement of proceedings before the grand jury, which was impaneled in September 1963.

incriminated by his answers. Pappadio does point out, correctly, that the immunity does not bar the government from prosecuting him under the indictment or for perjury in the testimony he may give before the grand jury. The danger of such prosecutions is something different than the danger of self-incrimination, however, and the protection of § 1406—like that of the constitutional privilege which it replaces—is directed only at the latter. Section 1406 does effectively protect the witness from being prejudiced in any criminal proceeding as a result of his answers; it creates a defense to prosecution for acts as to which he is compelled to testify, and it bars the use of such testimony against him in a prosecution for any other acts.³

If Pappadio is required to give any testimony relating to the matters charged in the 1958 indictment, in response either to the questions now at issue or to subsequent questions, he could then move to have the indictment dismissed as to himself. And even if his answers are not such as to entitle him to dismissal of the indictment, he is protected against the answers being used against him in any criminal proceeding, including one under the pending indictment.

It appears to be Pappadio's position, however, that protection against self-incrimination is insufficient in this case because the privilege not to testify before a grand jury while under indictment is part of the privilege of a criminal defendant not to testify at trial, a privilege which goes beyond the privilege against self-incrimination. See *Piemonte v. United States*, 367 U. S. 556, 565 (1961) (Douglas, J., dissenting). The legitimate interests of a witness before a grand jury, even a witness under indictment, would seem

3. By its express terms, § 1406 does not protect a witness from prosecution for perjury committed while testifying under that section's compulsion. Such a limitation has been held not to make a statutory grant of immunity an inadequate substitute for the Fifth Amendment privilege. *Glickstein v. United States*, 222 U. S. 139 (1911). The theory of *Glickstein* is that the Fifth Amendment protects only against self-incrimination with respect to past acts, not with respect to the testimony being given.

to be sufficiently protected by the privilege against self-incrimination. And, apart from the *Piemonte* dissent, we find no authority for also extending to such a witness the privilege not to testify at all, even where given immunity.

The second and third grounds offered for the claim of privilege are that the requested facts are protected by the attorney-client privilege and that the questions interfere with the right to effective representation by counsel guaranteed by the Sixth Amendment. The factual premise for both grounds is Pappadio's allegation that the meetings were with counsel and witnesses in connection with the 1958 indictment and a possible prosecution for perjury.

Since the policies served by the attorney-client privilege go beyond protection against self-incrimination, the privilege is not destroyed by a grant of immunity from prosecution. See Note, 72 Yale L. J. 1568, 1578 (1963). Pappadio's reliance on the privilege in this case is misplaced, however. On the present record we cannot determine whether the privilege could properly be asserted even with respect to the subject matter of the meetings. In any event, the grand jury has not inquired into the subject matter of the meetings, and the questions which it has asked—who was present; where did the meetings take place; who arranged them—have not touched on matters meriting the protection of the privilege. See *Colton v. United States*, 306 F. 2d 633 (2 Cir. 1962), cert. denied, 371 U. S. 951 (1963). For the same reason, the questions have in no way interfered with Pappadio's right to effective representation by counsel. Compare *Coplon v. United States*, 191 F. 2d 749 (D. C. Cir. 1951), cert. denied, 342 U. S. 926 (1952).

Pappadio also objects to his sentence. He contends that the penalty imposed for criminal contempt after only a summary trial is constitutionally limited to that provided for petty offenses. See *United States v. Barnett*, 376 U. S. 681, 695 n. 12 (1964). Read literally, the *Barnett* dictum does indeed stand for such a rule, and it appears to have

been so interpreted by a majority of a panel of the Court of Appeals for the District of Columbia. See *Rollerson v. United States*, No. 17675, October 1, 1964 (2-1 decision). However, we adhere to our prior decisions, which have interpreted the *Barnett* dictum as not applying where the contempt is committed in the presence of the court and it remains possible for the defendant to comply with the court's order at the time that the contempt proceedings are begun. See *United States v. Shillitani*, No. 29117, May 18, 1965; *United States v. Tramunti*, No. 29387, April 5, 1965; *United States v. Castaldi*, 338 F. 2d 883, 885, petition for cert. filed, 33 U. S. L. Week 3223 (Dec. 17, 1964); *United States v. Harris*, 334 F. 2d 460, 463, cert. granted, 379 U. S. 944 (1964).

We have considered Pappadio's contention that the questions were not shown to be relevant to the grand jury's inquiry, and we find it to be without merit.

The judgment of the district court is affirmed.

MEDINA, *Circuit Judge* (concurring and in part dissenting):

I agree with my brothers of the majority on all points except the sentence to a period of two years imprisonment. This, in my opinion, is too much. We have held that this Court has power to reduce the period of imprisonment meted out for a contempt of court, see *United States v. Levine*, 1961, 288 F. 2d 272, applying the unambiguous mandate of *Brown v. United States*, 1959, 359 U. S. 41, 52, and I would reduce appellant's sentence to one year instead of two. I realize that this Court has upheld sentences of two years in similar cases, but I wish to register my dissent.

Opinion in District Court.

HERLANDS, District Judge.

The Court having considered the evidence and the documents finds as follows:

1. Notice of this hearing was given by an order to show cause signed by me on October 14, 1964, and served on Andimo Pappadio, the witness, and his counsel.

2. A grand jury was duly impaneled for this District in September 1963, and subsequently began an investigation into possible violations of the Federal Narcotic laws, which are referred to in Title 18, United States Code, Section 1406. The grand jury was engaged in this investigation on February 14, 1964, April 24, 1964, and May 8, 1964.

3. Andimo Pappadio, the witness, was duly subpoenaed to appear and testify before this grand jury by a valid subpoena dated February 3, 1964.

4. Pursuant to said subpoena, Andimo Pappadio, the witness, did appear and testify before the grand jury on February 14, April 24, and May 8, 1964.

5. On August 4, 1964, in the presence of Pappadio and the grand jury, oral and written application was made by the United States Attorney pursuant to the provisions of Title 18, United States Code, Section 1406, to have the aforesaid Pappadio instructed to testify.

The written application consisted of an affidavit of the United States Attorney and the written approval of the Attorney General.

This application was made to the Hon. Lloyd F. MacMahon, who, after considering the application, found that the United States Attorney had complied with the provisions of Title 18, United States Code, Section 1406, and was entitled to have the Court instruct the witness to testify and produce evidence before the grand jury.

Judge MacMahon explained to Andimo Pappadio, the witness, that full and absolute immunity from federal and state prosecution would be granted to him with respect to all matters concerning which he might be compelled to testify.

6. All steps were properly taken under the provisions of Title 18, United States Code, Section 1406, so that when Judge MacMahon ordered Pappadio to answer the questions Pappadio was then absolutely immune from prosecution, and was not subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he might testify.

7. On August 4, 1964, Pappadio returned to the grand jury, but then and there refused to answer the questions.

8. On October 6, 1964, Andimo Pappadio again appeared before the same grand jury and refused to answer the questions.

9. On October 8, 1964, Andimo Pappadio was brought before me for an additional instruction. In the presence of Pappadio's attorney I again explained the immunity provisions of Title 18, United States Code, Section 1406. I again informed Pappadio that he had full and complete immunity as to any testimony which he gave before the grand jury, and then instructed Pappadio to return to the grand jury and give testimony.

10. On October 9, 1964, Pappadio appeared before the same grand jury. On this occasion Pappadio answered certain questions but refused to answer other questions on the basis of the First, Fifth and Sixth Amendments.

11. On October 13, 1964, Pappadio returned before the same grand jury. At this time he refused to answer the same questions which he had refused to answer on October 9, 1964.

Thereafter Pappadio was brought before me, and after hearing argument by his attorney, I ordered Pappadio to

return to the grand jury and answer the questions which he had previously refused to answer.

That same afternoon Pappadio appeared before the grand jury and wilfully refused to answer the questions as directed by me.

12. Among the questions that the witness so refused to answer were the following questions which are the predicate of the present contempt proceeding:

"Q. Mr. Pappadio, who are the attorneys who were present at these meetings?

"A. I respectfully decline to answer on the grounds of the First, Fifth and Sixth Amendment.

"Q. Aside from the meetings which you described, which took place in the street, where else did you meet with Lucchese?

"A. I decline to answer under the First, the Fifth and the Sixth Amendment.

"Q. Who else was present at these meetings besides yourself, Lucchese and the attorneys?

"A. I respectfully decline to answer under the First, Fifth and Sixth Amendment.

* * *

"Q. All right; how many of such meetings were there?

"A. I respectfully decline to answer on the ground of the First the Fifth and Sixth Amendment.

* * *

"Q. Where did the meetings take place?

"A. I respectfully decline under the First, the Fifth and the Sixth Amendment."

The aforesaid questions which Pappadio refused to answer on October 13, 1964, were material and pertinent to the grand jury investigation then being conducted. Pappadio's refusal to answer these questions obstructed and hindered the grand jury in its investigation.

13. During the hearing conducted before me on October 28 and October 30, 1964, the United States submitted evidence and full opportunity was given to the witness, Andimo Pappadio, to present evidence. During this hearing Pappadio was at all times represented by counsel.

14. The Court finds that the witness is guilty of a criminal contempt as charged.

Conclusions of law:

1. The Court concludes that the witness is guilty of a criminal contempt as charged.

2. Andimo Pappadio is adjudged guilty of criminal contempt for his wilful disobedience on October 13, 1964, of a lawful order of the Court. Andimo Pappadio, in refusing to answer questions before the grand jury on October 13, 1964, wilfully violated the order of Judge MacMahon of August 4, 1964, and my order of October 13, 1964.

3. The Court hereby fixes the punishment as two years. An order to that effect shall be entered forthwith in accordance with Rule 42(b) of the Federal Rules of Criminal Procedure.

The foregoing portion of my decision consists of numbered findings and conclusions. I should now like to discuss some of the points. This portion of my decision represents an expression of opinion with regard to only a few of the points. Those points that I regard as transparently without merit will not be discussed or adverted to.

It is incorrect to argue, as the witness now does, that the burden of proof would be upon him to show the affirmative fact that the Government has used or is using his testimony in a prosecution, including the prosecution of a now pending indictment against the witness. Should the Government try the witness under the pending indictment, the burden would be on the Government to prove, clearly and convincingly, that all of its proof is derived from sources

completely independent of the witness's grand jury testimony, and any clues or leads derived from such testimony.

The burden would be upon the Government to establish the negative fact that none of its evidence is the fruit of the protected tree of the witness's immunized testimony. Such is the teaching of the cases on this point and in analogous situations. *Murphy v. Waterfront Comm'n*, 378 U. S. 52, 103 (1964) (concurring opinion of Mr. Justice White); *Lapides v. United States*, 215 F. 2d 253, 261 n. 10 (2d Cir. 1954) (dissenting opinion) (no disagreement as to this point); cf. *United States v. Tane*, 329 F. 2d 848, 853 (2d Cir. 1954); *United States v. Agueci*, 310 F. 2d 817, 834 (2d Cir. 1962), cert. denied, 372 U. S. 959 (1963); *United States v. Paroutian*, 299 F. 2d 486, 489 (2d Cir. 1962); *United States v. Coplon*, 185 F. 2d 629, 636 (2d Cir. 1950), cert. denied, 342 U. S. 920 (1952).

The memorandum submitted in behalf of the witness in opposition to the order to show cause does not discuss a single question involved herein. Instead, it is a generalized argument that side-steps the specific matters posed.

Under Title 18 U. S. C. Section 1406, the immunity statute, the Government has the right to obtain truthful testimony from the witness. That is the objective of the provision that excludes the witness's perjury, if any, from the immunizing effect of the statute.

The immunity statute does not create an opportunity for a witness to effect an illusory exchange of real immunity in return for false testimony. There must be a bargain equivalent whereby the Government obtains the truth in exchange for its granting immunity.

That is the purpose of the concluding provisions in Section 1406, which read:

"But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evi-

dence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

Virtually all immunity statutes contain the same or similar provisions with regard to perjury that may be committed by a witness.

The argument advanced in behalf of the witness with regard to a possible perjury prosecution, if accepted, would completely frustrate and nullify the purpose underlying the perjury provision contained in Section 1406 to which I have just alluded.

An order shall be entered in accordance with the directions of the Court hereinabove set forth. So ordered.

• • •

APPENDIX B.

**Judgment of United States Court of Appeals
Sought to Be Reviewed.**

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of May one thousand nine hundred and sixty-five.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. HAROLD R. MEDINA,
HON. THURGOOD MARSHALL,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANDIMO PAPPADIO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

A true copy,

A. DANIEL FUSARO,
Clerk.

(Seal)

APPENDIX C.

ORDER DENYING PETITION FOR REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ANDIMO PAPPADIO,

Appellant.

Petition for Rehearing and Motion to Stay Issuance of Mandate Pending Application for a Writ of Certiorari to the Supreme Court of the United States.

LAURITANO, SCHLACTER & SCHNEIDER,
New York, N. Y., for appellant.

The motion for rehearing is denied.

The motion to stay our mandate is granted, subject to the conditions of our Rule 28(c).

J. E. L.,
H. B. M.,
T. M.,
U. S. C. JJ.

June 21, 1965

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
v.
ANDIMO PAPPADIO,
Appellant.

Petition for Rehearing In Banc.

LAURITANO, SCHLACTER & SCHNEIDER,
New York, N. Y., for appellant.

As no active circuit judge has requested that this case be reheard in banc, and as Judge Medina, who is qualified to vote thereon by virtue of 28 U. S. C. § 43 votes to deny, the petition is denied.

J. EDWARD LUMBARD,
Chief Judge.

June 21, 1965

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 442

ANDIMO PAPPADIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23-29) is reported at 346 F. 2d 5. The opinion of the district court (Pet. App. 30-35) is reported at 235 F. Supp. 887.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1965. A petition for rehearing was denied on June 21, 1965. On July 6, 1965, Mr. Justice Harlan extended the time to file a petition for a writ of certiorari to August 19, 1965, and the petition was filed on August 10, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

QUESTIONS PRESENTED

1. Whether a witness may be sentenced to imprisonment for two years upon a nonjury adjudication for contempt in refusing to answer questions before a grand jury.

2. Whether the two-year sentence was reasonable.

3. Whether petitioner may refuse to testify notwithstanding a grant of immunity because there is an outstanding indictment against him.

4. Whether, after having answered some questions under a grant of immunity, petitioner may refuse to answer others on the ground that the answers already given might subject him to a charge of perjury.

5. Whether the answers to questions asked of petitioner were protected by the attorney-client privilege.

6. Whether the questions which petitioner refused to answer were relevant to the grand jury's inquiry.

STATEMENT

Petitioner appeared pursuant to a subpoena before a grand jury of the Southern District of New York and refused, on the grounds of the privilege against self-incrimination, to answer questions other than some preliminary information (R. 97-109). During one of these appearances he was told that there had been testimony before a Senate committee and statements to law-enforcement officers that one Thomas Lucchese was the head of a group of people engaged in a number of illegal activities, including the illicit narcotics traffic, and that it had been alleged that petitioner was a member of that group (R. 102).

Thereafter petitioner was granted immunity under 18 U.S.C. 1406 and directed to answer the questions which he had previously refused to answer (R. 110-116). At subsequent appearances before the grand jury he declined to answer all but a few questions (as to name, residence and age), predicating his refusal on the First as well as the Fifth Amendment (R. 118-135). When the grand jury sought from the court an order directing petitioner to answer, his attorney called attention to the fact that petitioner was named as a defendant in an indictment returned in 1958 charging a conspiracy to violate the narcotics laws. The government conceded that fact and noted that petitioner had been severed before the case went to trial and that he had not been tried since that time¹ (R. 139-141). The court ruled that the outstanding indictment did not justify petitioner's refusal to answer since 18 U.S.C. 1406 expressly provides that the immunity it grants, both as to prosecution and as to use of testimony, relates to any criminal proceeding against the defendant in any court, so that "the testimony which is compelled may not be used against this defendant in any prosecution, whether based on a pending indictment or on an indictment that may hereafter be procured" (R. 143). The court directed the witness to answer all questions previously asked (R. 167).

Petitioner then appeared before the grand jury and answered a number of questions (R. 170-188). He

¹ The case against those who went to trial is reported as *United States v. Aviles*, 274 F. 2d 179, certiorari denied, 362 U.S. 974; see also the ruling on motion for a new trial, 337 F. 2d 552, certiorari denied, 380 U.S. 906.

was asked how often and where he had met Lucchese since he had been served with the grand jury subpoena, and petitioner replied that he had met him a few times on the street and that they had met with lawyers on a few occasions (R. 185-186). After consulting with counsel, petitioner refused to identify the lawyers or state who else was present at the meetings (R. 186-188). The judge, with petitioner's counsel present, was asked to rule on these questions (R. 190). The judge explained to petitioner that the attorney-client privilege applied to conversations between lawyer and client, but that the prosecutor had the right to ask when and where he met the lawyer, and whether anybody else was present (R. 201-202). Petitioner thereafter said that the meetings were in the afternoon and that they could have lasted a couple of hours, but he again declined to say where the meetings took place or who was present (R. 210-211).

An order was issued to show cause why petitioner should not be punished for contempt (R. 3-6). Petitioner, in his reply, claimed that he was not required to answer on the grounds that the questions were not relevant; that there was an outstanding indictment against him; that the answers already given might be the subject of a trial for perjury; and that answers to the questions would interfere with the attorney-client relationship (R. 7-32). Petitioner repeated these arguments at the hearing on the order to show cause (R. 33-46, 60-61). Petitioner demanded a jury trial (R. 34), but did not contest the fact that he had refused to answer the questions at issue (R. 51). The

court found petitioner in contempt for refusing to answer five questions (R. 74-75) ² and sentenced him to imprisonment for two years or until further order of the court should petitioner answer the questions (R. 217-218). The court of appeals affirmed the conviction (Pet. App. 36-37).

ARGUMENT

1. The question whether the district court had the power to impose a sentence in excess of the petty-offense maximum for contempt for the witness' refusal to answer questions before the grand jury is before this Court in *Harris v. United States*, No. 6, this Term. The reasonableness of the sentence, assuming that there was power to impose it, may also be affected by decision in *Harris*. We therefore suggest that it would be appropriate to defer ruling on these issues until after the decision in *Harris*.

The other issues raised by petitioner do not warrant review by this Court:

2. The fact that there is outstanding against petitioner an indictment returned in 1958 does not excuse his failure to testify under a grant of immunity in 1964. Under that grant of immunity, nothing said in

² These questions are as follows:

"Mr. Pappadio, who are the attorneys who were present at these meetings?"

"Aside from the meetings which you described, which took place in the street, where else did you meet with Lucchese?"

"Who else was present at these meetings besides yourself, Lucchese and the attorneys?"

"All right; how many of such meetings were there?"

"Where did the meetings take place?"

response to the grand jury's questions in 1964 and no leads obtained therefrom may be used against petitioner in any trial. As the court of appeals observed, if petitioner "is required to give any testimony relating to the matters charged in the 1958 indictment, in response either to the questions now at issue or to subsequent questions, he could then move to have the indictment dismissed as to himself. And even if his answers are not such as to entitle him to dismissal of the indictment, he is protected against the answers being used against him in any criminal proceeding, including one under the pending indictment" (Pet. App. 27). The views expressed by two dissenting members of the Court in *Piemonte v. United States*, 367 U.S. 556, 565, that a grant of immunity is ineffective once an indictment has been returned, concerned the particular facts of that case, in which the indictment related to the same subject matter about which the defendant was asked questions under the grant of immunity. In the present case, the grand jury was not investigating the crimes which were the subject matter of the 1958 indictment, and the petitioner was not an "accused" in the current inquiry.

3. An immunity statute is not rendered constitutionally defective merely because the witness may be prosecuted for perjury committed while testifying under a grant of immunity. *Glickstein v. United States*, 222 U.S. 139. There is no merit, therefore, to petitioner's argument that his testimony denying allegations made by government counsel (such as petitioner's membership in the Lucchese group) might become the basis for a perjury prosecution if he

testified further to conflicting facts. If the possibility that one statement under oath might conflict with another statement made in the course of the same testimony would be sufficient to raise the danger of self-incrimination of perjury which petitioner asserts (Pet. 19), a witness in any civil or criminal proceeding could invoke the same claim after having given several answers under oath. A witness could, for example, under this theory, refuse to answer questions on cross-examination on the claim that those answers might be used against him on a perjury prosecution for testimony given during his direct examination. This is not, we submit, the sort of real hazard against which the privilege is designed to protect. Cf. *Hoffman v. United States*, 341 U.S. 479, 486-487.

4. The government did not contend, nor did the court below hold, that the grant of immunity resulted in a loss of any attorney-client privilege. In fact the court of appeals specifically stated that since "the policies served by the attorney-client privilege go beyond protection against self-incrimination, the privilege is not destroyed by a grant of immunity from prosecution" (Pet. 28). All that the court below held was that the inquiries which petitioner refused to answer—questions as to who was present and where the meetings took place—did not fall within the attorney-client privilege. See *Colton v. United States*, 306 F. 2d 633, 636-638 (C.A. 2), certiorari denied, 371 U.S. 951; *Goddard v. United States*, 131 F. 2d 220 (C.A. 5). If there are circumstances in which the disclosure of persons present at an attorney-client conference could breach the secrecy protected by the privilege, peti-

tioner made no showing that any of these circumstances were present here, nor did he even suggest that the meetings with attorneys in Lucchese's presence related to the kinds of discussions covered by the privilege.

5. The relevance of the questions at issue to the subject matter of the grand jury investigation is evident from the context of the questions. Petitioner was told at the outset that the grand jury was investigating the activities of the Lucchese group, including alleged illegal sales of narcotics. It was relevant to that inquiry to learn whether petitioner had had meetings with Lucchese after the inquiry started, when those meetings were held, and who was present at any meeting. On their face the questions satisfy the standards of pertinency governing Congressional committees, which are stricter than those applicable to grand juries. See *Blair v. United States*, 250 U.S. 273, 282; *United States v. Levine*, 267 F. 2d 335, 336 (C.A. 2), affirmed, 362 U.S. 610.

Respectfully submitted,

RALPH S. SPRITZER,
*Acting Solicitor General.**

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

SEPTEMBER 1965.

*In lieu of the Solicitor General who has disqualified himself.

Supreme Court of the United States

October Term, 1901

Argued and heard

November 11, 1901

THE UNITED STATES OF AMERICA

On Petition for a writ of Habeas Corpus
Court of Appeals for the Fifth Circuit

Repley Bird et al.

D/ Counsel
Lawrence B. Williams
U. S. District Court
at New Orleans, La.

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IN THE
Supreme Court of the United States.

No. 442

ANDIMO PAPPADIO,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

Petitioner's principal arguments are set forth in full in his petition for certiorari. This reply brief is devoted to answering a few points raised by respondent and to rebutting arguments which misconstrue our position.

1. Respondent has chosen to avoid meeting one of the most fundamental questions raised by petitioner by the artless device of grossly misstating petitioner's position. In the largest sense, this case poses the issue of what limits, if any, exist upon the power of the Government to compel testimony through the means of an immunity statute. Resisting the efforts to force him to testify in this case, petitioner contended that the compulsion violated several basic constitutional rights. Specifically he challenged the coercion as violative of the Fifth Amendment guarantee that a defendant cannot be compelled to take the stand in a criminal case, the First Amendment privilege of silence and freedom of association, and the Sixth Amendment

right to effective assistance of counsel. One looks in vain in respondent's memorandum for any argument directed to these fundamental questions.

Worse than the failure of respondent to speak to the constitutional issues is the attempt to leave these questions out of respondent's statement of the facts of the case. The memorandum, on page 4, purports to state in full the objections raised by petitioner in refusing to answer. The statement omits all reference to the constitutionally based objection. *Tacit satis laudant*: their silence is praise enough.

2. The fifth question presented by the petition for certiorari is:

"Whether a grand jury witness, having unconditionally testified to non-involvement with a group allegedly engaged in illegal narcotics activity, having thus contradicted under oath evidence said to be in the hands of the Government, thereby becoming subject to the peril of a perjury prosecution, has a privilege under the Fifth Amendment to refuse to answer questions about his relationship with the alleged leader of that group."

The Government responds:

"An immunity statute is not rendered constitutionally defective merely because the witness may be prosecuted for perjury committed while testifying under a grant of immunity. . . . There is no merit, therefore, to petitioner's argument that his testimony denying allegations made by government counsel (such as petitioner's membership in the Lucchese group) might become the basis for a perjury prosecution if he testified further to conflicting facts." (Pp. 6-7)

The crudity of this gross distortion of the question presented is beyond explanation.

Ever so subtly, the respondent sets the stage for the transformation by the reference to "allegations made by government counsel" rather than the sworn testimony said to be in the Government's possession. A conflict between petitioner's testimony and the "allegations made by government counsel" is of no particular significance. A conflict between petitioner's testimony, and the sworn testimony previously obtained by the Government is radically different. The latter, which is the case at hand, presents a frontal conflict of testimony under oath. Out of that clash, a perjury prosecution is not a fanciful fear.

Protecting himself against that possibility, petitioner argued that he had a privilege against self-incrimination. He maintained that he could not be compelled to testify to contacts he had had with the supposed leader of the illegal group in which he denied participation. Any testimony petitioner might give, even to the most innocent of contacts, could be construed as ambiguous or worse, thereby tending to establish the truth of the sworn testimony in the Government's possession, which would in turn lead to a conclusion that petitioner's testimony had been false and perjurious.

The Government's distortion completely ignores the sworn testimony given against petitioner before he was compelled to testify. Rather the Government would have it appear that petitioner, having said one thing under oath, was afraid that he might say something in direct conflict later; the former and latter statements, if inconsistent, would show that one must be false.¹ This contention is a product of the imagination of Government counsel and has no relationship to the question raised by petitioner, whose plight is a real one.

1. Thus the Government memorandum, in the sentence following that quoted in the text above, refers to "the possibility that one statement under oath might conflict with another statement made in the course of the same testimony" and ascribes this as the basis of petitioner's argument (P. 7).

Petitioner feared further inquiry, not because it would conflict with *his previous testimony*, but because it might be circumstantially supportive of the primary conflicting evidence already in the possession of the Government. Without that primary evidence, which the Government conveniently chooses to ignore, the subordinate evidence would have nothing to support. Government counsel said they had the primary evidence under oath. Petitioner flatly and unequivocally denied the truth of that evidence. Surely, there is a serious question whether he can be compelled further to strengthen the Government's case against him, notwithstanding the Fifth Amendment privilege against self-incrimination.

3. Petitioner strongly maintained that he could not be compelled to testify in this federal grand jury investigation of illegal narcotics activities because he was the defendant in an outstanding indictment charging him with a violation of the federal narcotics statute. Petitioner cited, and relied upon, the opinion of two Justices in *Piemonte v. United States*, 367 U. S. 556, 565 (1961), where far less egregious circumstances existed: the indictment was not returned until after the defendant there had refused to testify, and the indictment had been dismissed before this Court's decision. The Government memorandum purports to distinguish the present case from *Piemonte* on the ground that there, unlike this case, "the indictment related to the same subject matter about which the defendant was asked questions" (P. 6). There is not a shred of evidence to support the Government's pronouncement. Illegal narcotics activities underlay the indictment and were the subject of the grand jury investigation.

4. The Brief for the United States in *Harris v. United States*, No. 6, October Term 1965, states:

"In the contempt area, . . . there is no reason to fear that excessive uncorrectible punishments will be

imposed by district courts; the exercise of discretion may be carefully policed by courts of appeals and by this Court." (P. 65)

It is respectfully submitted that petitioner's case shows, contrary to the Government argument, that there is indeed reason to fear excessive *uncorrected* punishments. It strains credulity to believe that appellate review can or will serve as an adequate safeguard to prevent harsh punishments for contempt. Certainly this Court cannot be converted into a body that is regularly available to review sentences in contempt cases. Nor can the courts of appeals be relied upon to mitigate too severe impositions. This case is illustrative. Petitioner answered virtually all the questions put to him. His refusal to answer five was explained on a variety of weighty constitutional and statutory grounds. Nonetheless, the trial court saw fit to sentence him to two years in jail, and the Court of Appeals affirmed. Excessive, uncorrected sentences will continue to occur unless this Court acts to set limits upon the uncontrolled and arbitrary discretion of the lower courts. At a minimum, exercising the function posited by the Government, this Court should consider the excessive nature of the penalty in this case.

CONCLUSION.

For the foregoing reasons and those stated in our opening brief, we respectfully submit that the judgment of the court of appeals should be reversed.

JACOB KOSSMAN,
Counsel for Petitioner.

Of Counsel:

LAURITANO, SCHLACTER & SCHNEIDER.

DEC 29 1965

JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

October Term, 1965.

No. 442.

ANDIMO PAPPADIO,
Petitioner,
v.

UNITED STATES OF AMERICA.

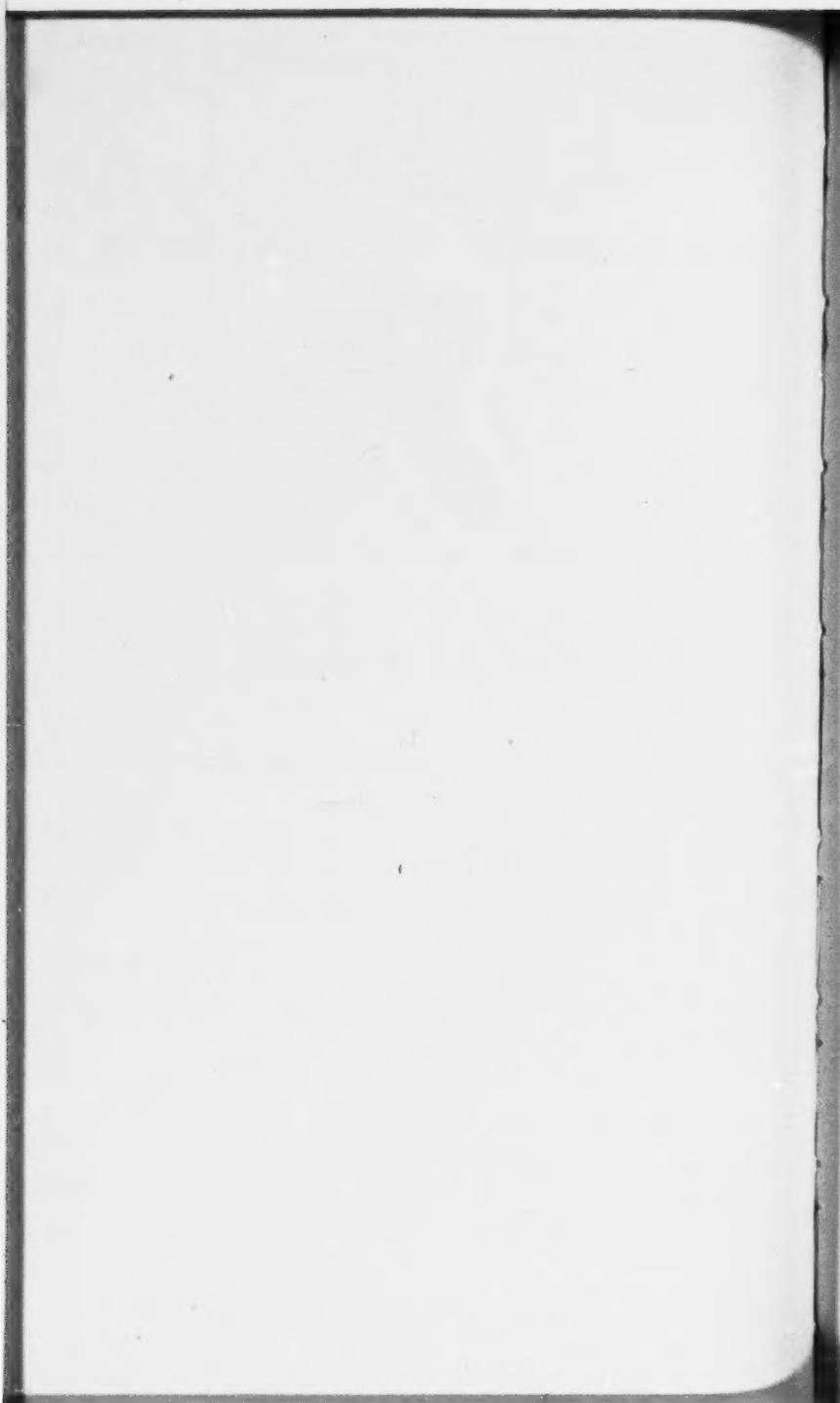
On Writ of Certiorari to the United States Court of Appeals
for the Second Circuit.

BRIEF FOR THE PETITIONER.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia, Pa. 19107
Counsel for Petitioner.

Of Counsel:

LAURITANO, SCHLACTER
& SCHNEIDER,
205 West 34th Street,
New York, N. Y.



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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 442.

ANDIMO PAPPADIO,
Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The opinion of the district court (R. 71a-78a) is reported at 235 F. Supp. 887, and the majority and dissenting opinions in the court of appeals (R. 220-226) are reported at 346 F. 2d 5.

JURISDICTION.

The judgment of the court of appeals was entered on May 24, 1965 (R. 227). Petitions for rehearing were denied on June 21, 1965 (R. 228, 229). On July 6, 1965, Mr. Justice Harlan granted an extension of time, to and including August 19, 1965, for filing a petition for a writ of certiorari (R. 229). The petition for a writ of certiorari was filed on August 10, 1965, and granted on November 15, 1965 (R. 230), 382 U. S. —. The jurisdiction of this Court rests upon 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether petitioner should have been granted a trial by jury on a charge of criminal contempt of court where he has been sentenced to two years' imprisonment.

2. Whether the District Court could legally sentence petitioner to two years' imprisonment for contempt of court following a non-jury hearing under Rule 42(b) of the Federal Rules of Criminal Procedure.

3. Whether, assuming *arguendo* that a sentence of two years may be imposed for criminal contempt without a trial by jury, there was an abuse of discretion in sentencing petitioner to two years' imprisonment for refusing to answer five questions where he had answered more than one hundred questions.

**CONSTITUTIONAL PROVISIONS, STATUTES AND
RULES INVOLVED.**

Constitution of the United States:

Article III, § 2, Par. 3 provides in pertinent part:

The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; and such Trial shall be held in the State where the said Crimes shall have been committed * * *.

The Fifth Amendment provides in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * *

The Sixth Amendment provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *

18 U. S. C. 1 provides:

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six

months or a fine of not more than \$500, or both, is a petty offense.

18 U. S. C. 401 provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion such contempt of its authority, and none other, as—

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U. S. C. 3771 provides:

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the district of the Canal Zone and the Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States commissioners. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All

laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

Federal Rules of Criminal Procedure involved:

Rule 1 provides:

Rule 1. Scope.

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

Rule 2 provides:

Rule 2. Purpose and Construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

Rule 7 provides:

Rule 7. Indictment and the Information.

(a) Use of Indictment or Information.

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or

by information. An information may be filed without leave of court.

Rule 42 provides:

Rule 42. Criminal Contempt.

(a) Summary Disposition.

A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judges and entered of record.

(b) Disposition Upon Notice and Hearing.

A criminal contempt except as provided in sub-division (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

STATEMENT.

A grand jury in the United States District Court for the Southern District of New York was impaneled in September 1963, and subsequently began an investigation into possible violation of the Federal Narcotics Laws, referred to in 18 U. S. C. § 1406. On his first three appearances before the Grand Jury, petitioner refused to testify on the ground of self-incrimination. There was then pending in the Southern District of New York an indictment against petitioner, returned in 1958, charging him with conspiracy to violate the narcotics laws (R. 11a).

The Government, without moving to dismiss the indictment, which is still pending, undertook to have petitioner granted immunity, pursuant to § 1406, for any transaction or matter about which he was compelled to testify. Statutory immunity was granted (R. 116a).

Thereafter, petitioner again appeared before the Grand Jury and testified. He answered over 125 questions (R. 170a-214a). In the course of interrogation, the prosecutor put a carefully prepared question:

“So that you’ll have a better appreciation of the purpose of this Grand Jury proceeding, I want to advise you that there’s been testimony before a Senate committee and statements have been made to Federal law enforcement agencies that a person named Thomas Lucchese is at the head of a group of people that are engaged in a number of illegal activities. It has been alleged that one of these alleged illegal activities is the illicit narcotics traffic. It’s also been alleged, sir, that you are a member of this particular group—

"Now, what we're attempting to do is to find out whether or not these allegations are true or false. Are these allegations true?" (R. 174a-175a)

Petitioner responded:

"I am not a member of this group, if they exist I have no knowledge if there is a group. I do not deal in narcotics. I do not know if Mr. Lucchese deals in narcotics and I do not know if anybody else in this room or out of this room is dealing with narcotics." (R. 175a)

The Government also asked petitioner before the Grand Jury the following questions:

"Q. Mr. Pappadio, I'm now going to ask you some of the questions that Judge Herlands directed you to answer the time you were before him prior to today. The first one is this, Mr. Pappadio—At the narcotics trial of Vito Genovese there was testimony that you attended a meeting at the home of Rocco Mazzie. Did you attend this meeting?"
[Petitioner answered, "No, sir."]

"Q. Do you know of such a meeting?" [He answered, "No, sir."] "Q. Do you know Rocco Mazzie?" [Petitioner answered, "No, sir."]
(R. 214a)

Petitioner thus flatly denied, under oath, subject to the pains of a perjury prosecution, statements which he had been told were given to the Government. Petitioner denied, unconditionally, any knowledge about or complicity in illegal narcotics activities, the sole subject under investigation by the Grand Jury.

Petitioner answered all other questions put to him, until the prosecutor began to inquire about conferences between petitioner and attorneys (178a). These petitioner declined to answer, and the machinery was set in motion for this contempt proceeding.

After some further questioning had elicited the facts that petitioner knew Thomas Lucchese, and had previous contact with him, the prosecutor began to inquire about conferences where Lucchese, petitioner, attorneys and other persons had been present (R. 178a). Petitioner refused to answer, relying at first on the attorney-client privilege (R. 178a-183a). Later, having been allowed to consult with counsel, he expanded his objection to the First, Fifth, and Sixth Amendments (R. 183a-189a). The Government sought the aid of the District Court, and the Court directed petitioner to answer the questions (203a-209a). After the District Judge had withdrawn from the grand jury room, petitioner again declined to testify about his meetings with counsel (R. 210a-212a).

These questions were unanswered:

(1) "Mr. Pappadio, who were the attorneys who were present at these meetings?" (R. 210a);

(2) "Aside from the meetings which you described, which took place on the street, where else did you meet with Lucchese?" (R. 210a);

(3) "Who else was present at these meetings besides yourself, Lucchese and the attorneys?" (R. 210a);

(4) "All right; how many of such meetings were there?" (R. 211a);

(5) "Where did the meetings take place?" (R. 212a)

It is relevant to note that, with respect to the fourth question, petitioner did answer at an earlier stage (R. 178a).

On the following day, the Government moved for an order that petitioner show cause why he should not be held in contempt (R. 4a-6a). The order was issued (R. 3a), and the matter came on for hearing before William B. Herlands, D. J. Petitioner's sworn answer (R. 7a-10a) recited the pending indictment outstanding against him and, further, the assertion by counsel for the Government that they had received information that petitioner was a member of a group engaged in illegal narcotics traffic. The answer pointed to petitioner's unequivocal denial of these charges before the Grand Jury and averred that petitioner has been and is in consultation with attorneys and prospective witnesses with respect to the indictment:

"To answer the questions put to him before the Grand Jury would result in the disclosure to the Government of matters of defense, as well as matters within his privilege of confidence between client and attorney. To answer such questions would result in interference with and impairment of his right to defend himself and the effective assistance of counsel." (R. 9a)

The answer also indicated that petitioner had consulted with attorneys on the possible perjury proceedings that might be brought as a result of his testimony.

The answer further stated that petitioner was aware and believed that he has been the subject of surveillance, including electronic eavesdropping, by federal and local officials. Additional surveillance with

respect to his attorney and witnesses would substantially impair and prejudice his ability to defend himself (R. 9a).

In addition to matters of privilege, the answer asserted that the questions he had declined to answer were not pertinent to the subject under inquiry by the Grand Jury. The subject had not only been announced to petitioner, but it had been the basis upon which the order granting immunity under § 1406 had been obtained.

A hearing was had before the District Court on October 28, 1964. At the outset a motion for a jury trial was made and denied (R. 34a). The Government stipulated that an indictment is now pending in the United States District Court for the Southern District of New York against the petitioner for violation of the narcotics laws (R. 61a). The Government further stipulated that it has statements to the effect that the petitioner was involved as a member of a group engaged in illegal activities and that there was testimony in a case that the petitioner was involved in narcotics (R. 59a-60a).

The Assistant United States Attorney told the District Court that the outstanding indictment against petitioner was not on the trial calendar, since with respect to the other defendants who did stand trial the case was still in the appellate courts (R. 62a). The petitioner had been severed from that trial (R. 60a). The Government stated that "the case is not presently on the trial calendar" (R. 61a).

At the hearing counsel for the petitioner argued that the petitioner's having had answered many questions and having refused to answer only four or five questions was relevant to the issue of willfulness (R.

54a); that the questions asked of the petitioner were not material and relevant (R. 55a); that he was facing a prosecution for perjury for which he has no immunity (R. 56a-57a); and that requiring petitioner to answer questions involving or relating to meetings with attorneys and the persons present at these meetings violates his rights under the First and Sixth Amendments (R. 57a-58a).

Counsel for petitioner had argued previously that the Government had no right to call petitioner as a witness before the Grand Jury since he was under indictment (R. 139a-142a). The District Court then ruled that this argument was without merit (R. 142a-144a).

The petitioner placed into evidence the outstanding indictment against him (R. 11a-20a, 60a). From the record of a previous trial of other defendants under that indictment, petitioner introduced the transcript of the testimony by a witness for the Government stating that petitioner had been present at the meeting (R. 21a-32a, 59a-60a).

The District Court took the matter under advisement and adjourned the hearing for two days until October 30, 1964. On that date, the petitioner was adjudged guilty of criminal contempt of court and sentenced to a term of imprisonment of two years. The sentence further provided that if the petitioner answer the questions as directed prior to expiration of the sentence or discharge of the Grand Jury, whichever first occurs, further application may be made to the court to reconsider the sentence (R. 76a, 78a). This Grand Jury was discharged in March of 1965.

The District Court refused to grant bail pending appeal on the ground that "the appeal would be frivolous and would be taken for delay" (R. 2a, 84a-85a).

Petitioner surrendered to the United States Marshal and served twenty days in prison until released by order of the Court of Appeals on the day of argument in that court.

The majority of the court below sustained the sentence of two years for criminal contempt stating that the "*Barnett dictum*" does not apply where the contempt is committed in the presence of the court and it remains possible for the defendant to comply with the court's order at the time that the contempt proceedings are begun. Judge Medina agreed with the majority on all points except that the sentence to a period of two years' imprisonment was in his opinion "too much" and that he would reduce the sentence to one year (R. 226).

SUMMARY OF ARGUMENT.**I.**

The right to a trial by jury is a basic and fundamental feature of our system of federal jurisprudence. Petitioner was sentenced to two years' imprisonment by a district judge without the benefit of a jury trial which petitioner had demanded. Article 3, § 2 of the Constitution, which provides that the trial of all crimes *except* in cases of impeachment shall be by jury does not make any exception for criminal contempt; neither does the Fifth Amendment, which provides that no person shall be held to answer for an infamous crime *except* in cases arising in the land or naval forces. The Sixth Amendment, which provides that in all criminal prosecutions the defendant shall have the right to be tried by an impartial jury, does not *except* criminal contempts. Clearly there is no provision in the Constitution that states that a criminal contempt is not a crime.

There is no valid historical basis for the assumption that the Constitutional draftsmen believed that criminal contempt that was committed outside of court was subject to punishment by the exercise of a court's summary jurisdiction. Quite the contrary. Modern history research has exposed the "historical error." However, regardless of what might have been the previous practice of trying a contempt committed in the presence of the court, *Harris v. United States*, decided by this Court on December 6, 1965, now makes it clear that a right to jury trial is wholly inapposite for such contempts. Where speedy punishment may be necessary in order to vindicate the court's dignity and authority a trial by jury may be dispensed with under those circumstances. But it follows that where swift-

ness is not a prerequisite of justice that there is no necessity of dispensing with a jury.

The establishment of jury trial will provide protection for defendants without limiting the use of contempt power by the court to protect *itself* against contempts occurring in the courtroom. The slight delay because of a jury trial of issues of fact in a contempt hearing would *not* interfere with the courts' use of contempt power.

If this Court does not desire to rest on Constitutional grounds a determination that an unqualified right to jury trial exists on charges of criminal contempt not committed in the presence of the court, it may by virtue of its supervisory power over the inferior federal courts establish safeguards against the tendency of the arbitrary exercise of the contempt power by those judges. Obviously the most significant safeguard would be the right to jury trial.

II.

The district court was without authority to sentence petitioner for criminal contempt summarily, to a term of imprisonment in excess of six months. This limitation is derived from the fact that punishment upon a summary trial is constitutionally limited to that penalty provided for petty offenses. *United States v. Barnett*, 376 U. S. 681, 694-695 n. 12, decided on April 6, 1964. There is no merit to the Government's contention that the above *Barnett dictum* lacks historical support as a Constitutional rule. Obviously there must be serious doubt about the Constitutional validity of sending people to a penitentiary for two years without affording them a trial by jury. But since this Court can create for federal courts a standard or limitation under

its supervisory power that is fully adequate to answer any challenge to the legitimacy of the *Barnett* rule it should not be disturbed. The *Barnett* rule raises no particularly perplexing problems since it is no more difficult to administer that rule than the rule that limits federal courts and their jurisdiction to cases where a specified dollar amount is in controversy. Every lower court that has considered the *Barnett* rule has accepted and applied the limitation except the courts in the Second Circuit.

III.

Even if a sentence of two years could be imposed for a criminal contempt without a trial by jury, there was in this case a flagrant abuse of discretion in sentencing this petitioner to such a prison term. Petitioner had answered over 125 questions out of the 129 or 130 that he had been asked. He was a cooperative witness before the Grand Jury. His refusal to answer the four or five questions was non-willful and based, not without justification, on the belief that the answers to these questions would prejudice his defense against his outstanding indictment and a probable prosecution for perjury for which he would have no immunity. Unlike the witness who refuses to give answers to any questions except his name and address, petitioner fully cooperated with the Grand Jury except only when the few questions on which Government was quite willing to terminate him as a witness before the Grand Jury because of his refusal to answer these questions. There was here no "brazen refusal to cooperate with the Grand Jury." The record clearly reveals that this is a fitting case where "only nominal punishment if any is indicated." *Harris v. United States*.

ARGUMENT.

I.

On this serious charge of criminal contempt outside the presence of the court, petitioner was entitled to trial by jury.

A. The Constitutional Basis.

Most of this Court's early statements negating a right to jury trial in *all* contempt cases preceded the discovery that they rested upon an historical error, or were "shrouded in much obscurity." Two recent decisions have faced the issue with the benefit of the scholarship that brought the fallacy to light. In *Green v. United States*, 356 U. S. 165, notwithstanding the exposure of the historical error,¹ this Court reiterated that there is no right to a jury trial in *all* criminal contempt cases, even though the petitioners there had not contended that they were entitled to a jury trial, 356 U. S. at 187. More recently, in *United States v. Barnett*, 376 U. S. 681, the Court denied a claimed right to jury trial, substantially relying upon *Green*. The "historical error" has therefore not been enough, by itself, to persuade the Court to consider the question free from the chain weight of precedents.²

1. The majority of the Court held "We are told however that the decisions of this Court denying the right to jury trial in criminal contempt proceedings are based upon an 'historical error' reflecting a misunderstanding as to the scope of the power of English courts at the early common law to try summarily for contempts, and that this error should not here be extended to a denial of the right to grand jury. But the more recent historical research into English contempt practices predating the adoption of our Constitution reveals no such clear error and indicates if anything that the precise nature of those practices is shrouded in much obscurity." 356 U. S. at 185.

2. The opinion of the Court in *Green*, rejecting the force of the argument based upon the demonstrated historical fallacy, explicitly combined both kinds of contempt; ". . . it at least seems clear that English practice by the early Eighteenth Century comprehended the

However, this Court's recent decision in *Harris v. United States*, No. 6, October Term, 1965, undermines the holdings of *Green* and *Barnett*, that a jury trial is not required in *all* criminal contempts outside the presence of the court. Both cases had treated as a single class all criminal contempts, whether in the presence of the court or not. The clear determination in *Harris* that there are not one, but two distinct classes of contempt, *to be treated separately*, represents a major development. Added to the established historical error that has so long clouded this aspect of the law of contempt, the *Harris* decision presages the plenary consideration by this Court for the first time of the powerful arguments that have been advanced in support of the right to jury trial in prosecutions for criminal contempt not occurring in the presence of the Court.

Harris makes clear that a right to jury trial is wholly inapposite for contempts in the presence of the court. "[S]peedy punishment may be necessary in order to achieve 'summary vindication' of the court's dignity and authority." Trial by jury would interfere considerably with the necessity for such summary vindication. But, *Harris* now establishes, in dealing with other contempts "swiftness [is] not a prerequisite of justice." There is in such cases no compelling urgency that warrants dispensing with normal deliberative processes. It is reversible error to disguise a contempt case that does not require summary vindi-

use of summary powers of conviction by courts to punish for a variety of contempts committed within and outside court." 356 U. S. at 185. The opinion of the Court discusses throughout, as a single category, all criminal contempts. Mr. Justice Frankfurter, whose concurrence was crucial to the disposition in *Green*, wrote a separate opinion that spoke in the *singular* of the "power to punish for contempt" and indiscriminately cited the long line of contempt cases involving both kinds of contempts. The analysis of the Court in *Barnett* explicitly rests upon and extends the determination in *Green*.

cation of the court's dignity and authority as a contempt in the presence of the court. In such cases, *Harris* holds, orderly processes must and should be followed.

Harris' shattering of the lump concept of criminal contempts renews the issue, which ought to be decided free from the distorting coloration of cases involving contempts directly affronting judicial dignity and authority.

The arguments on the merits to support a determination that right to jury trial exists, where the charge is criminal contempt outside the presence of the court, have been fully explored, especially in the opinions of the dissenting Justices in *Green v. United States*, 356 U. S. 165, 193-219, and *United States v. Barnett*, 376 U. S. 681, 725-726. See, *Jury Trial for Criminal Contempts: Restoring Criminal Contempt Power and Protecting Defendants' Rights*, 65 Yale L. J. 846 (1955). It would be a work of supererogation to repeat here what has been canvassed so soundly and persuasively in those opinions. A few observations, however, may be pertinent.

Article III, section 2, paragraph 3 of the Constitution provides that "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury. . . ." In making the exception, the Framers did not provide for criminal contempt.³ The Fifth Amendment provides

3. In *Gompers v. United States*, 233 U. S. 604, 610-611, Justice Holmes stated: "These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure . . . and that at least in England it seems that they still may be and preferably are tried in that way." See also Frankfurter and Landis, *Power to Regulate Contempts*, 37 Harv. L. Rev. 1010, 1042, 1046 (1924).

that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the Land or Naval Forces, when in actual service, in time of war or public dangers; . . ." There is no exception expressed in this Amendment for criminal contempt. The Sixth Amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." On the *face* of the Constitution, the right to trial by jury in criminal contempt cases seems assured.

The Government has had prepared an elaborate study of the practice in contempt cases in colonial courts; this study was submitted to the Court as an Appendix to the United States' brief in the *Harris* case, and the brief relies heavily on the supposed findings of that survey. Apart from its difficulty of differentiating clearly between civil and criminal contempt cases, the Government's study follows the now discredited theory that all criminal contempts are of one kind. Stripped of the cases involving contumacious behavior in the presence of the court, the survey is hardly supportive of the Government's argument. Indeed the Government in its brief in the *Harris* case does not refer to one case where a colonial court tried a defendant without a jury for disobedience of an order outside the presence of the court.

No logical argument can justify denial of a trial by jury in modern criminal contempt proceedings. It must be conceded that the recent practice of district courts is a substantial departure from the past. This Court noted in *Barnett* that "It does appear true that since 1957 the penalties imposed in cases reaching

this Court have increased appreciably." 376 U. S. at 694-695. Within the last year, federal courts in the Southern District of New York have imposed at least four sentences of two years' imprisonment.⁴ The *Green* case involved a sentence of three years. In a recent Fifth Circuit case the district judge sentenced a recalcitrant witness to five years; he later reduced that to three years prior to appeal. *Johnson v. United States*, 344 F. 2d 401 (5th Cir. 1965).

The Government points out in its *Harris* brief that, in considering the severity of sentences actually imposed, "it is, of course, necessary to bear in mind the significantly different attitude taken in colonial times to the question of imprisonment . . ." (p. 49). No amount of such rationalization can possibly relate harsh sentences of two, three or five years in prison to the practice in colonial times. Nor will they fit into or even be close to the pattern of cases through the Nineteenth and first half of the Twentieth Century.⁵

The Government brief in *Harris* ultimately attempts to justify the denial of the Constitutional right to jury trial to persons charged with such serious crimes on the ground of "policy" (p. 59). To the extent that the Government is not addressing itself to contempts in the presence of the court requiring speedy vindication of the court's dignity and authority, its argument rings with a familiar, hollow sound. The Government advances a baseless claim of necessity:

4. *United States v. Bialkin*, 331 F. 2d 956 (2d Cir. 1964), execution of sentence suspended; *United States v. Castaldi*, 338 F. 2d 883 (2d Cir. 1964); *United States v. Shillitani*, 345 F. 2d 290 (2d Cir. 1965); and the present case.

5. See, e.g., *United States v. Shipp*, 214 U. S. 386, 215 U. S. 580, where this Court imposed sixty and ninety day sentences for the lynching of a prisoner in flagrant violation of its order that custody of the prisoner not be disturbed pending review of his conviction.

arbitrary judicial power is deemed necessary in the interest of efficiency and to prevent independent juries from interfering. Livingston in his work on criminal procedure in 1873 wrote:

“Not one of the oppressive prerogatives of which the crown has been successively stripped in England, but was in its day, defended on the plea of necessity. Not one of the attempts to destroy them, but was deemed a hazardous innovation.”

The principle of expedience on which the Government relies would equally apply to every single guarantee in the Bill of Rights. One of the most precious elements of the right to trial by jury is that it does interfere with the swift and efficient dispatch of acts of tyranny. That protection,⁶ as a matter of “policy,” is worth far more than any incidental costs that the institution may involve.⁷

B. The Non-Constitutional Bases.

It is not necessary for this Court to rest on Constitutional grounds a determination that an unqualified right to jury trial exists on charges of criminal contempt not committed in the presence of the court. Such a conclusion clearly can be reached in reliance upon this Court’s established supervisory power over

6. Compulsory process and assistance of counsel; right to a public hearing; the benefit of a statute of limitations; the proof of guilt beyond a reasonable doubt and freedom from compulsion to testify, are some of the protections that have traditionally been associated with criminal offenses admittedly apply to criminal contempts. Thus, it does not require a radical shift in judicial doctrine to now state that jury trials are required for criminal contempts committed outside the presence of the courtroom especially where the sentence of imprisonment is two years.

7. The fact that a jury trial would be available to a defendant in criminal contempt case does not mean that it would be availed of in all cases. It is a fact that most people do plead guilty to criminal offenses that have been prosecuted by either indictment or information.

the lower federal courts. See *McNabb v. United States*, 318 U. S. 332. Especially in light of the indications that lower court judges have recently begun to view their unbridled power in contempt cases as permitting more and more severe penalties, it is fitting to establish safeguards against the dangers of arbitrary exercise of that power. The most significant safeguard is the right to jury trial.

A further ground for affirming the right to jury trial can be gleaned from the interaction of Rule 42(b) of the Federal Rules of Criminal Procedure and relevant sections of the United States Code. Rule 42(b) provides that a defendant is entitled to a trial by jury "in any case in which an act of Congress so provides." Under 18 U. S. C. § 1, "any offense punishable by death or imprisonment for a term exceeding one year is a felony." As in this case, and others cited above, criminal contempts can be and are punished by imprisonments for terms exceeding one year. By the statutory definition, such offenses are felonies. Rule 7(a) of the Rules of Criminal Procedure (which have the authority of law under 18 U. S. C. § 3771), guarantees indictment by a grand jury in such offenses. If a grand jury is assured, *a fortiori* a defendant in such a case is entitled to trial by a petit jury.

II.

Since the contempt charge against petitioner was a serious one, punishable by imprisonment in excess of six months, petitioner was entitled to trial by jury.

To assert that the guilt or innocence of any person who is punished by a sentence of imprisonment for two years should be decided by a jury does not seem to be unreasonable. While *United States v. Barnett*,

376 U. S. 681, rejected the proposition that a Constitutional right to jury trial exists in *all* criminal contempt cases, the Court stated that such a right to jury trial does apply where a penalty greater than six months is contemplated.⁸ Although the declaration was contained in a footnote to the opinion of the Court, and was denominated *dictum*, it was expressly added for the guidance of lower courts in the "effective administration of justice." Under this rule of the *Barnett* case, petitioner's conviction must be reversed. The Government in the *Harris* case, *supra*, sought to have this Court repudiate this *dictum*.

Two points may be noted concerning the rule announced in *Barnett*. The declaration expressly refers to a Constitutional limitation as underlying the Court's concern, but the precise limitation to the penalty provided for petty offenses need not be sought purely in Constitutional doctrine. On several occasions, this Court has exercised its supervisory power over lower federal courts to fashion limitations that will avoid confrontation of difficult Constitutional questions. See *McNabb v. United States*, 318 U. S. 332.

The second point concerns the interpretation to be given to the Court's utilization of the penalty for petty offenses as the standard to govern criminal contempts that may be summarily tried. In 18 U. S. C. § 1(3), a petty offense⁹ is defined as any misdemeanor,

8. "In view of the impending contempt hearing, effective administration of justice requires that this *dictum* be added: Some members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." 376 U. S. at 696 n. 12. This *dictum* could only have been written in the opinion because a majority of the Court subscribed to it.

9. In *Schick v. United States*, 195 U. S. 65, this Court decided that there was no Constitutional requirement that petty offenses be tried by jury. See also, *District of Columbia v. Clawans*, 300 U. S. 617.

the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both.

Unless this Court is now to retreat from the principle recently adopted in *Barnett*, petitioner's conviction must be reversed. Petitioner, unlike the petitioner in *Harris*, sought and was denied trial by jury on the charge against him (R. 34a). He was summarily tried and sentenced to two years' imprisonment—twice as long as *Harris*—well in excess of any penalty contemplated for petty offenses.

In *Harris v. United States*, *supra*, the Government launched a full scale attack on the *Barnett* decision. It is appropriate here to assay the quality of the Government's arguments.

First, the Government had sought to demonstrate that, in colonial times, authorized punishment for criminal contempts occasionally exceeded that authorized for petty offenses. As noted above, the Government's survey is contaminated by its erroneous premise that all criminal contempts, whether or not in the presence of the court, are of a single class. It is, therefore, clearly inapposite to the limitation fashioned by this Court in *Barnett*. The Government has failed to demonstrate that the definition of petty offenses in current federal law bears any relation whatsoever to the crimes that the Government describes as petty offenses in the colonies. The dynamics of criminal law in colonial times manifestly are far different from the situation today, as the Government itself recognizes in its argument that "it is, of course, necessary to bear in mind the significantly different attitude taken in colonial times to the question of imprisonment" (p. 49). The significantly different attitudes taken in colonial times are equally likely to affect

the meaning of petty offenses, no matter how the Government defines them for that era.¹⁰ The Government's historical argument against the *Barnett* rule thus founders on the patent fallacy of comparing non-equivalents.

While the Government seeks support for its argument against the Constitutional basis for the *Barnett* rule in colonial history, it never deals with the relevant history of the place of criminal contempts in the federal courts prior to the past decade. Only in recent years have the lower federal courts manifestly departed from the practice of treating criminal contempts within the perimeters of petty offenses. It is that departure that has led to the sharpened awareness and concern for the limitations that the Constitution places upon the power of judges to imprison summarily.

The shortest answer to the Government's argument that the *Barnett* rule lacks firm historical support as a Constitutional rule is that such support is unnecessary. Plainly there is serious doubt about the Constitutional validity of imprisoning a man for two years without affording him trial by jury. On the basis of that doubt, this Court can create for federal courts a standard or limitation that obviates or minimizes the concern. This Court's supervisory power is fully adequate to answer any challenge to the legitimacy of the *Barnett* rule.

In *Harris v. United States*, the Government advanced a further argument against the *Barnett* rule, an argument that presumably would apply whether the

10. The Government never makes totally clear how it is classifying "petty offenses" in colonial times. It appears, however, that they rely on what the colonial legislatures called petty offenses (p. 53) or on offenses triable by a justice of the peace (pp. 52, 53, 54). Indeed, the Government excludes from its analysis offenses triable by two or more justices of the peace en banc (pp. 54, 55 and n. 15).

rule is grounded on the Constitution *vel non* or on this Court's supervisory power. The Government argued that the rule was administratively unworkable and raises "particularly perplexing practical problems" (p. 63). Reading this argument, one finds it difficult to decide whether the Government is being petulant or merely fanciful.

The Government obstinately blinds itself to the fact that the decision whether to accept the ceiling on permissible punishment under the *Barnett* rule, for contempts committed outside the presence of the court, will be made by the prosecutor or aggrieved party unless the defendant insists on his right to trial by jury. The judge will not have to decide "in the dark" (p. 63). Nor will the outcome be the result of "blind chance." In a case such as this, if the Government wants to seek a penalty greater than the *Barnett* rule permits in summary trial, it will ask the court to impanel a jury and can advise the court of the reasons it seeks the more severe sanctions. The effort of the Government to create the impression that, for contempts committed outside the presence of the court, the onus is on the court to initiate the contempt proceeding and to determine without any information the appropriate procedure, is a distortion that bears no resemblance to reality.

The *Barnett* rule raises no particularly perplexing practical problems. It is no more difficult to administer than the rules, completely familiar to federal courts, that limit their jurisdiction to cases where a specified dollar amount is in controversy. The fact that, on occasion, a jury may be impanelled in a case that leads to a conviction and sentence less than the ceiling that might have been imposed in summary trial is a prospect that should not be disturbing to anyone.

The converse possibility that the prosecutor will fail to realize the seriousness of a contempt in advance of prosecution is so difficult to imagine as to be unworthy of consideration.

The *Barnett* rule as a rule of Constitutional law is well grounded in history and purpose. As an exercise of this Court's supervisory power,¹¹ it is beyond challenge. The objections made on the ground of practicality are frivolous. It is submitted, therefore, that the Court should not reverse the *Barnett* decision that punishment for criminal contempt by summary trial without a jury be limited to that penalty provided for petty offenses.¹²

III.

Assuming arguendo that a sentence of two years may be imposed for a criminal contempt without a trial by jury, there was clear abuse of discretion in sentencing petitioner to such a prison term.

If petitioner's prior arguments, that the Constitution guarantees trial by jury in all charges of criminal contempt outside the presence of the court, and that a sentence in excess of six months cannot be imposed after denial of a request for jury trial in a criminal contempt proceeding, are rejected, petitioner's conviction would not be reversed. In that event, petitioner submits that his sentence is grossly excessive and ought

11. Note, *The Supervisory Power of the Federal Courts*, 76 Harv. L. Rev. 1656 (1963).

12. Every lower court that has considered the *Barnett* rule, with the exception of the courts in the Second Circuit, has accepted and applied the limitation. See *Rollerson v. United States*, 343 F. 2d 269 (D. C. Cir. 1964); *Randazzo v. United States*, 339 F. 2d 79 (5th Cir. 1964); *Johnson v. United States*, 344 F. 2d 401 (5th Cir. 1965); *United States v. Schiffer*, 351 F. 2d 91 (6th Cir. 1965). See also *In re Holland Furnace Co.*, 341 F. 2d 548 (7th Cir. 1965) (*Barnett* limitation applied in fact.)

to be reduced by this Court for abuse of discretion by the trial court.

The sentence imposed against petitioner is one of the longest and most severe penalties ever assessed in a criminal contempt proceeding that has come before this Court for review. Except for the recent rash of such sentences in the federal courts in the Southern District of New York, with the approval of the Court of Appeals for the Second Circuit,¹³ such a harsh penalty is virtually unheard of in the federal system. The contrast between the two-year sentence against petitioner and the sentences of this Court in *United States v. Shipp*, 214 U. S. 386 and 215 U. S. 580, is striking. For lynching a prisoner in flagrant disregard of this Court's order staying his execution pending review of his conviction, this Court imposed sentences of sixty and ninety days.

Petitioner's contempt, if such it be, is not deserving of a sentence of imprisonment for two years, or indeed any period of imprisonment. Unlike this Court's characterization of *Green v. United States*, *supra*, the contempt here was not "by any standards a most egregious one." 356 U. S. at 188. His action cannot be described as a "brazen refusal to cooperate with the grand jury." *Harris v. United States*, *supra*. Following conferral of statutory immunity, petitioner answered over one hundred and twenty-five questions! He was a cooperative witness before the Grand Jury, despite the fact that he was and still is a defendant in an outstanding 1958 indictment charging him with violation of the narcotics laws. That *his denials of involvement in illicit activities* may not have pleased the United States prosecutors, who said they already had sworn evidence to the contrary, does not alter the fact

13. See cases in note 4 *supra*.

that he was a cooperative witness, answering fully all the questions put to him.

Only when the interrogation turned to matters that petitioner believed to involve the pending indictment did he refuse to answer. Petitioner believed, we submit not without justification, that interrogation into his relations with counsel and witnesses threatened to prejudice the posture of his defense against the pending indictment. Petitioner believed, we submit not without justification, that the prosecution could not interfere with his right to counsel under the Sixth Amendment. Whether these concerns on the part of petitioner were legally valid is not the issue here, particularly since this Court's order granting certiorari excluded those questions. What is pertinent is that petitioner based his objections on serious and unresolved legal grounds.

Nothing more forcefully illustrates the *good faith attitude* of petitioner, *the converse of a brazen refusal to cooperate*, than the statement of the Assistant United States Attorney who was conducting the investigation that petitioner was not being willfully contumacious. Responding to petitioner's refusal to answer a question, the prosecutor said: "I'm assuming what you're saying to me you're saying in good faith. I'm also telling you that you have no right to decline to answer it" (R. 179a).

Petitioner not only feared the prejudice to his defense against the pending indictment, but he likewise feared that he was being whipsawed into a possible perjury prosecution. Petitioner had testified under oath that he was not involved in illegal narcotics activities either alone or as a member of a group. The Government claimed that it had sworn evidence to the contrary. Having contradicted this sworn evidence,

petitioner's concern for a perjury prosecution was not fanciful. Then the Government pressed for petitioner to testify about meetings he had attended with Lucchese. Even though such meetings may have been entirely innocent, others might interpret them differently. "[A] witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege [against self-incrimination] serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Slochower v. Board of Education*, 350 U. S. 551, 557-558; see also *Grunewald v. United States*, 353 U. S. 391, 421. Petitioner reasonably might fear that further testimony about conferences with Lucchese would ensnare him in a perjury prosecution, which though unfounded, was nonetheless real. Again, the point is not presently whether petitioner's concern was validly grounded. Rather it is to demonstrate that petitioner was not simply refusing to answer by being willfully contumacious.

Petitioner also challenged the questions he declined to answer as not demonstrably pertinent to the announced subject of the Grand Jury investigation. This challenge rested on the plausible legal conclusion that the limitations that this Court has imposed on legislative inquiry by committees of Congress are also applicable to judicial inquiry by grand juries. See *Deutch v. United States*, 367 U. S. 456; *Watkins v. United States*, 354 U. S. 178. This was deemed the more true because, unlike legislative committees, this Grand Jury could not freely change or expand the subject under inquiry and still compel petitioner's testimony, which was extracted under the very limited scope of a particular immunity act, 18 U. S. C. § 1406.

This case thus concerns a witness who had answered over one hundred and twenty-five questions,

who refused to answer only four questions, whose refusal was described by the Assistant United States Attorney as in good faith, and whose refusal was based upon multiple, substantial legal objections of a serious nature. Such a case does not warrant a severe penalty. The typical witness who refuses to give answers to any questions except his name and address furnishes nothing to the appellate courts when he claims that the sentence was so excessive as to amount to an abuse of discretion.

Petitioner was not such a witness. If witnesses called before the grand jury are to receive the same severe maximum sentences whether they refuse to answer any questions or whether they have cooperated, as this petitioner has, witnesses in the future would be extremely reluctant to cooperate when not the slightest consideration is given them for answering practically every question that was asked.

The record discloses that the petitioner is fifty years old (R. 128a), that he lives in a house worth between \$15,000 and \$20,000 that is subject to a mortgage (R. 173a), that he is in the business of manufacturing ladies' coats (176a), that in the 1930's when petitioner was 18 or 19 years old he had pleaded guilty to violating the Federal Narcotics Law but that at a subsequent date he had stated that he had pleaded guilty because his lawyer had advised him and that he was in fact innocent, and that he had received a Presidential pardon (R. 83a, 108a, 154a), and that he has no other criminal record. The record also reveals that under oath petitioner stated that he is not a member of any criminal group, and that he does not deal in narcotics (R. 175a).

In *Green v. United States*, 356 U. S. at 188, this Court said:

"We take this occasion to reiterate our view that in the areas where Congress has not seen fit to impose limitations on the sentencing power for contempts the district courts have a special duty to exercise such an extraordinary power with the utmost sense of responsibility and circumspection. The 'discretion' to punish vested in the District Courts by § 401 is not an unbridled discretion. Appellate courts have here a special responsibility for determining that the power is not abused, to be exercised if necessary by revising the sentences imposed."

No one can describe the action of the district court in this case as the exercise of "extraordinary power with the utmost sense of responsibility and circumspection." That power has been gravely abused and a revision of the sentence is imperative.¹⁴

The United States' brief in *Harris v. United States, supra*, having cited this Court's position in *Green* just quoted said (p. 65):

"In the contempt area, therefore, there is no reason to fear that excessive uncorrectible punishments will be imposed by district courts; the exercise of discretion may be carefully policed by courts of appeals and by this Court."

On the strength of that statement, we urge the Solicitor General to join with petitioner in requesting this Court to reduce petitioner's sentence to the time already served.

14. "[T]he intention with which acts of contempt have been committed must necessarily and properly have an important bearing on the degree of guilt and the penalty which should be imposed." *Cooke v. United States*, 267 U. S. 517, 538.

Twenty days of imprisonment have already been served, in part because the prosecution opposed release of petitioner on bail pending appeal despite the serious legal questions presented (R. 1a-2a). It is submitted that a twenty-day sentence is certainly more than adequate for the technical, non-willful contempt. Petitioner has been further burdened with the expense and anxiety of prosecuting appeals to two levels of appellate courts.¹⁵

We earnestly submit that this is a fitting case where "only nominal punishment if any, is indicated." *Harris, supra*. Unless this Court reverses the conviction outright for the reasons previously advanced, we ask that this case be terminated without further injury to petitioner.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals be reversed.

Respectfully submitted,

JACOB KOSSMAN,

1325 Spruce St.,

Philadelphia, Pa. 19107

Counsel for Petitioner.

Of Counsel:

LAURITANO, SCHLACTER

& SCHNEIDER,

205 West 34th Street,

New York 1, N. Y.

DECEMBER 1965

15. Judge Medina, on the Court of Appeals below, found the sentence against petitioner "too long" (R. 226); he would have reduced it to one year.

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 412

SALVATORE SHILLITANI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 442

ANDIMO PAPPADIO, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in *Shillitani* (No. 412) (2 S.R. 71-76)¹ is reported at 345 F. 2d

¹ The printed record in *Shillitani v. United States*, No. 412, although in one volume, has two separate paginations. The first 24 pages are designated as "1 S.R.". The last 79 pages, which commence with the appendix filed by the government in the court below, are designated as "2 S.R.". References to the record in *Pappadio v. United States*, No. 442, are prefixed "P.R.".

290. The opinion of the court of appeals in *Pappadio* (No. 442) (P.R. 220-226) is reported at 346 F. 2d 5. The opinion of the district court in *Pappadio* (P.R. 70-78) is reported at 235 F. Supp. 887.

JURISDICTION

The judgment of the court of appeals in *Shillitani* was entered on May 18, 1965 (2 S.R. 77) and in *Pappadio* on May 24, 1965 (P.R. 227). A petition for rehearing filed by Pappadio was denied on June 21, 1965 (P.R. 228). On June 29, 1965, Mr. Justice Harlan extended the time within which to file a petition for a writ of certiorari in *Shillitani* to and including August 3, 1965 (2 S.R. 78), and on July 6, 1965, extended the time within which to file a petition for a writ of certiorari in *Pappadio* to and including August 19, 1965 (P.R. 229). The petition for a writ of certiorari in *Shillitani* was filed on July 31, 1965, and in *Pappadio* on August 10, 1965, and both petitions were granted on November 15, 1965 (2 S.R. 78-79; P.R. 230). 382 U.S. 913, 916. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a charge of contempt in refusing to answer questions before the grand jury requires a jury trial (Nos. 412 and 442) and an indictment (No. 412).
2. Whether the "admixture of civil and criminal contempt" invalidates the judgment of conviction (No. 412).

3. Whether it was constitutionally permissible for the district court to impose two-year sentences.

4. Whether the two-year sentence imposed on Papadio was reasonable (No. 442).

RULE INVOLVED

Rule 42, Federal Rules of Criminal Procedure provides in pertinent part:

* * * * *

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict of finding of guilt the court shall enter an order fixing the punishment.

STATEMENT

Shillitani v. United States, No. 412

On August 10, 1964, in the Southern District of New York, in a proceeding under Rule 42(b), F.R. Crim. P., petitioner was found guilty of contempt for willfully disobeying an order to answer certain questions before the grand jury after having been granted immunity from prosecution. He was sentenced to imprisonment for two years with the proviso that if he should answer the questions prior to the discharge of the grand jury, a further order "may be made terminating the sentence" (1 S.R. 21-22).

In February, April and May 1964, petitioner had appeared before the grand jury under subpoena and had refused to answer questions on the ground that the answers would incriminate him (2 S.R. 2-4, 8, 11-13, 14-18). On July 1, 1964, government counsel applied to Judge Wyatt for an order directing petitioner to testify before the grand jury under the immunity provisions of 18 U.S.C. 1406 (1 S.R. 3-6, 2 S.R. 66-70). Judge Wyatt instructed petitioner that he was being granted "full and absolute immunity" and that a failure to answer the questions would subject him to contempt proceedings (1 S.R. 6). The court read to petitioner the questions which it ordered him to answer (1 S.R. 14-19). On July 2 and again on August 4, 1964, petitioner reappeared before the grand jury and refused to answer the questions (2 S.R. 19-26, 27-33).

On August 10, 1964, upon oral notice and upon an order to show cause, petitioner was brought before

Judge MacMahon on a charge that he was in contempt of court (2 S.R. 39-42, 44, 56; 1 S.R. 1). A hearing was held before Judge MacMahon. No request for a jury trial was made. After requesting dismissal on the ground that the government had failed to prove a *prima facie* case, petitioner rested (2 S.R. 54-55).

The court found petitioner guilty of criminal contempt for his willful disobedience of the court order during his appearances before the grand jury on July 2, 1964, and on August 4, 1964 (2 S.R. 56-59). The court sentenced petitioner to imprisonment for two years "or until further order of this Court, should [petitioner] answer before the grand jury the questions * * * and should [petitioner] answer those questions before the expiration of said sentence or the discharge of said grand jury, whichever may first occur, the further order of this Court may be made terminating the sentence of imprisonment" (1 S.R. 21-22).² In affirming, the court of appeals construed this language to mean that petitioner had an unqualified right to be released if he obeyed the order of the district court (2 S.R. 76).

Pappadio v. United States, No. 442

On October 30, 1964, in the Southern District of New York, in a proceeding prosecuted on written notice, petitioner was found guilty of contempt for willfully disobeying an order to answer certain

² The court first said (2 S.R. 61): "I want to make it clear that the sentence of the Court is not intended so much by way of punishment as it is intended solely to secure for the grand jury answers to the questions that have been asked of you."

questions before the grand jury after having been granted immunity from prosecution. He was sentenced to imprisonment for two years with the proviso that if he should answer the questions prior to the discharge of the grand jury "the further order of this Court may be made terminating and modifying the sentence of imprisonment" (P.R. 217-218).

In February, April and May 1964, petitioner had appeared before the grand jury under subpoena and had refused, on the ground of self-incrimination, to answer numerous questions (P.R. 97-109). During one of these appearances he was told that there had been testimony before a Senate committee and statements to law-enforcement officers that a person named Thomas Lucchese was the head of a group of people engaged in a number of illegal activities, including the illicit narcotics traffic, and that it had been alleged that petitioner was a member of that particular group (P.R. 102).

On August 4, 1964, petitioner was granted immunity under the provisions of the Narcotic Control Act of 1956, 18 U.S.C. 1406, and directed to answer the questions which he had previously refused to answer (P.R. 110-117). At a subsequent appearance before the grand jury on that day and again on October 6, 1964, he again declined to answer all questions except identifying questions as to name, residence and age, predicating his refusal on the First and Fifth Amendments (P.R. 118-135).

On October 8, 1964, the grand jury asked the court again to instruct petitioner to answer the questions.

His attorney contended that petitioner should not be called as a grand jury witness so long as a 1958 indictment was pending against him which charged him with conspiracy to violate the narcotic laws³ (P.R. 136-141). His attorney also made objections to particular questions (P.R. 150-160). The court ruled that the outstanding indictment did not justify petitioner's refusal to answer since 18 U.S.C. 1406 expressly provided that the immunity it grants, both as to prosecution and as to use of testimony, covers any criminal proceeding against a defendant in any court (P.R. 143). It also overruled the objections to the questions (P.R. 163-165) and directed the witness to answer all questions previously asked (P.R. 167).

The next day and again on October 13, petitioner appeared before the grand jury (P.R. 170-189). He answered a number of questions, frequently consulting his attorney before answering. He admitted that he knew Lucchese and denied that he knew anyone who dealt in narcotics (P.R. 175). He testified that, since he had been served with the grand jury subpoena, he had met Lucchese a few times on the street and that they had met with lawyers on a few occasions (P.R. 185-186). After consulting with counsel, petitioner refused to identify the lawyer or state who else was present at the meetings. He also declined

³ Petitioner had been severed before the case went to trial (P.R. 140). The case against the defendants who were tried is reported in *United States v. Aviles*, 274 F. 2d 179 (C.A. 2), certiorari denied, 362 U.S. 974; see also the ruling on the motion for a new trial, 337 F. 2d 552, certiorari denied, 380 U.S. 906. The indictment against petitioner was recently dismissed.

to tell where the meetings took place (P.R. 186-188). The grand jury again sought an order directing petitioner to answer these questions (P.R. 190-196). Petitioner's attorney objected to the questions, contending that they interfered with the attorney-client privilege and were not relevant to the grand jury inquiry (P.R. 196-200). The judge, directing petitioner to answer, explained to him that the attorney-client privilege applied to conversations between lawyer and client, but that the prosecutor had the right to ask when and where he met the lawyer, and whether anybody else was present (P.R. 201-202, 209). Petitioner thereafter said that the meetings were in the afternoon and that they could have lasted a couple of hours, but he again declined to say where the meetings took place or who was present (P.R. 210-211).

An order was issued to show cause why petitioner should not be punished for contempt (P.R. 3-6). Petitioner, in his reply, claimed that he was not required to answer on the grounds that the questions were not relevant; that there was an outstanding indictment against him; that the answers already given might be the subject of a trial for perjury; and that answers to the questions would interfere with the attorney-client relationship (P.R. 7-32). Petitioner repeated these arguments at the hearing on the order to show cause (P.R. 33-46, 60-61). Petitioner demanded a jury trial (P.R. 34), but did not contest the fact that he had refused to answer the questions at issue (P.R. 38-41, 51, 68). The court found petitioner in contempt for refusing to answer five ques-

tions (P.R. 74-75).⁴ The court sentenced petitioner to imprisonment for two years "or until further order of this Court, should [petitioner] answer before the Grand Jury the questions * * * and should [petitioner] answer those questions before the expiration of said sentence or the discharge of said Grand Jury, whichever may first occur, the further order of this Court may be made terminating and modifying the sentence of imprisonment" (P.R. 217-218).⁵ The court of appeals affirmed the conviction (P.R. 220-226).

SUMMARY OF ARGUMENT

These cases again present for this Court's determination the question whether, and to what extent if at all, the Constitution requires a jury trial for charges of criminal contempt. Having surveyed the decisional law and the constitutional history in our briefs in cases recently heard by this Court—including *Harris v. United States*, No. 6, this Term (382 U.S. 162)—we do not believe it appropriate or necessary to repeat in full the arguments previously presented. Insofar as these cases raise again the validity of the

⁴ These questions are as follows:

"Mr. Pappadio, who are the attorneys who were present at these meetings?

"Aside from the meetings which you described, which took place in the street, where else did you meet with Lucchese?

"Who else was present at these meetings besides yourself, Lucchese and the attorneys?

"All right; how many of such meetings were there?

"Where did the meetings take place?"

⁵ The court of appeals, six days earlier, in affirming the conviction in *Shillitani*, had construed a similar sentence to mean that the contemnor had an unqualified right to be released if he obeyed the order of the district court (2 S.R. 76).

dictum of some of the Justices in *United States v. Barnett*, 376 U.S. 681, 695, n. 12, we refer the Court to our brief in *Harris*, which is particularly addressed to the historical premises on which that *dictum* rests. Since the limitation on the permissible contempt sentence which that *dictum* prescribes can be justified, as a matter of constitutional interpretation, only on historical grounds, we submit that it stands or falls on the historical evidence. For reasons stated in detail in our brief in *Harris*, we believe that history conclusively demonstrates that the *dictum's* premises are unsound.

I

In the cases now before the Court, we address ourselves principally to questions of policy. We believe that there are sound contemporary justifications for the oft-repeated rule that criminal contempts are not "criminal prosecutions" for purposes of the constitutional right to a jury trial.

A. An ordinary "criminal prosecution" arises out of the violation of a legislative command, and our legal system has always recognized that there is a greater need to obtain certain compliance with court orders than with legislative directives. All the Justices of this Court have expressed the view that a person subject to a court order may be imprisoned so as to compel him to obey the order; the same is obviously not true of a potential violation of a statute. Although criminal contempt is, as of the time when it is imposed, retrospective in nature in that it punishes past disobedience, we do not believe that it

can be properly analyzed by isolating it from the entire proceeding of which it is a part. The threat of a criminal contempt sanction often is the only compelling force that can be practically applied to obtain obedience to a court order. Orders which regulate a course of conduct cannot usually be enforced by civil contempt, and it is only the threat of certain punishment which coerces compliance. If the implementation of that threat becomes unsure, compliance with these orders is accordingly rendered doubtful. The Constitutional draftsmen apparently recognized that the enforcement of court orders must be treated differently from the enforcement of statutes because they plainly distinguished in the first Judiciary Act between the power to punish for crimes and the power to punish for contempts.

B. Juries serve a different function in trying statutory violations than they would if they were required to try contempts. Factual and legal issues have usually been exhaustively refined before a court order issues, and the jury would not have the duty in a contempt proceeding of applying a general law to a specific factual situation. Indeed, in many contempts there are no facts to be resolved, and the jury therefore would serve no purpose whatever.

C. The harm done to a rule of law by a jury's "nullification" of a court order would be much more substantial than the harm done by the failure to implement a statute. Court orders characteristically protect adjudicated private rights, and enforcement of an individual's constitutional or legal right ought

not to depend on the popular will reflected in a jury verdict. Moreover, respect for law is more likely to be undermined if disobedience of a particularized court order, directed to a specific defendant in a specific factual context, goes unpunished than if a generalized legislative judgment occasionally goes unenforced.

II

The facts of these cases illustrate the above principles. Both *Pappadio* and *Shillitani* involve refusals to obey orders to testify. Such orders rest upon judicial powers which are basic to the operation of our legal system. Courts must have the ability to compel the testimony of those who have no lawful reason to refuse to testify. And these cases demonstrate that civil contempt is not always a practical means of enforcing such orders. When a trial is short or a grand jury's term is about to expire, coercive imprisonment may be a totally inadequate means of forcing the witness to obey the order. In neither of these cases would a jury be able to carry out the traditional jury function of finding facts since no facts were in issue. In both these cases a criminal sanction was reasonably believed necessary, but in order to tailor the sanction to the wrong which had been committed, the sentencing judges included purge clauses authorizing the release of petitioners if they subsequently complied. Since criminal procedures were followed, petitioners were not prejudiced by this added condition.

Nor does the fact that the contumacious conduct was committed out of the presence of the court war-

rant a jury trial. Whether the contempt is committed in the court's presence determines whether notice and a hearing are required, not whether the conduct constituted a "crime" in the constitutional sense. And since no statute or rule limits permissible punishment or prescribes jury trial, there is no occasion for this Court's exercise of a supervisory power either to require jury trial or to place a fixed limit upon the permissible sentence.

III

The reasonableness of petitioner Pappadio's two-year sentence is reviewable in this Court, which must consider the willfulness of the contempt, the seriousness of the offense, and the public interest in obtaining compliance. We think the district court's judgment is supportable in light of the extensive narcotics conspiracy which was being investigated by the grand jury and the possibility that petitioner Pappadio's refusal was part of a concerted plan to hinder the investigation.

ARGUMENT

INTRODUCTION

These cases, together with *Cheff v. Schnackenberg*, No. 67, this Term, again present the question resolved by this Court in *United States v. Barnett*, 376 U.S. 681, in *Green v. United States*, 356 U.S. 165, and in many prior decisions reviewed in *Green*—i.e., whether criminal contempts are "crimes" or "criminal prosecutions" within the meaning of Article III, Section 2 or the Sixth Amendment of the Constitution, so as to

entitle an alleged contemnor to a jury trial as a matter of right. In addition, the judgments in the three cases turn on the validity and reach of the *dictum* of some of the Justices in *United States v. Barnett*, 376 U.S. 681, 695, n. 12, that "punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." The terms of imprisonment imposed in *Pappadio* and *Shillitani* exceed the statutory maximum for petty offenses, and that in *Cheff* is the maximum authorized by the petty-offense statute, 18 U.S.C. 1(3).

We will not attempt in these briefs to repeat the arguments and the survey of prior decisions contained in our briefs in *United States v. Barnett*, No. 107, O.T., 1963, and in *Green v. United States*, No. 100, O.T., 1957. And insofar as the detailed discussion of historical sources contained in our brief and appendix in *Harris v. United States*, No. 6, this Term, (382 U.S. 162), is relevant here, we respectfully refer the Court to those papers, which have been served on petitioners in these cases. The issues which remain to be discussed, in our view, concern the practical contemporary justification for the holding in *Barnett* and in the more than fifty cases cited therein which "support summary disposition of contempts, without reference to any distinction based on the seriousness of the offense." 376 U.S. at 694.

We believe that the holding of *Barnett* and *Green* rests firmly not only upon the constitutional history and the consistent course of decisional law elaborated in our earlier briefs, but also upon sound policies regarding the administration of justice. In short,

it is our position that disobedience of a court order, whether or not committed in the presence of the court, may and should be appropriately punished without the intervention of a jury. The cases now before the Court present, in our view, apt illustrations of the problems of judicial administration which may arise when court orders are disobeyed. They also demonstrate why the usual mode of trying criminal offenses—i.e., by indictment and upon the verdict of a jury—is unsuited to the trial of criminal contempts.

We note preliminarily that in our brief in *Harris v. United States*, No. 6, this Term, we discussed at length the reasons why, on the basis of the colonial materials printed in the appendix to that brief, we believe that this Court should reject the *dictum* in the Court's majority opinion in *United States v. Barnett*, 376 U.S. 681, 695, n. 12. As we explain in *Harris*, we find no basis for the assumption that the constitutional draftsmen believed criminal contempt to be "a species of petty offense punishable by trivial penalties" (376 U.S. at 752 (Goldberg, J., dissenting)) or for the corollary proposition that criminal contempts were tried without juries in colonial days because the permissible punishments did not exceed the limits of the petty-offense jurisdiction. Blackstone's *Commentaries*, which was the authoritative exposition of the common law for judges and attorneys at the time of the adoption of the Constitution, explicitly treated contempts separately from petty offenses. Blackstone's justification for summary proceedings in contempt cases differed substantially from the stated reasons

underlying summary proceedings for "disorderly offenses."

The colonial and early State statutes also rebut any assertion that a general limitation was imposed on the permissible punishment for criminal contempt. Certain kinds of contempt, such as breaches of courtroom decorum or failure of jurors or witnesses to respond to summonses, sometimes carried explicit statutory penalties. But we have found no limitation whatever, in any colonial act, on the power of a court to punish for disobedience of its order, and the only two statutes covering such a situation apparently authorize indefinite imprisonment. While most contempt cases in colonial times (as has been true since) concerned relatively minor infractions which were punished with lesser penalties, serious contempts subjected violators to heavy fine, substantial imprisonment or other grave punishment.

Particularly enlightening are the early statutes setting the limits of petty offense jurisdiction. If these limits are compared with punishments authorized or actually imposed for criminal contempt, it becomes clear that it was never considered by the colonists that there was any relation between a grave or flagrant contempt and the class of petty offenses traditionally triable without jury.

We believe that this consistently held view rests on an appreciation of the unique function and character of contempt proceedings, both of which render such proceedings *sui generis*. Our position is that the

procedures constitutionally prescribed for "crimes" and "criminal prosecutions" do not apply when the conduct being punished is violation of a court order. In other words, the policies which underlie the guarantees of Article III and the Sixth Amendment extend only to punishment for violation of a statute and not for disobedience of a court order. It is, of course, true that in the case of both legislative and judicial commands punishment is imposed on violators as a means of deterring other offenders and compelling obedience in the first instance. But there are critical distinctions between statutes and court orders in (1) the nature of the underlying command, (2) the refinement of the particular issues of fact and law before the duty to obey is imposed, and (3) the necessity, in the administration of a rule of law, for the certain punishment of those who disobey. The greater societal interest in obtaining obedience to court orders as compared to general statutes has always been thought to justify extraordinary coercive remedies for the former which have not been deemed permissible for the latter. These differences underlie the distinctive procedures which have traditionally been utilized in adjudicating charges of contempt. They distinguish contempt from the "crimes" and "criminal prosecutions" which the Constitutional draftsmen contemplated when they secured a defendant's right to trial by jury by expressly including the guarantee in Article III and the Sixth Amendment.

I

A CRIMINAL CONTEMPT PROCEEDING IS NOT A "CRIMINAL PROSECUTION" IN THE CONSTITUTIONAL SENSE

A. THE POWER TO PUNISH DISOBEDIENCE OF COURT ORDERS DIFFERS FROM THE POWER TO PUNISH VIOLATIONS OF LEGISLATIVE COMMANDS

In *Ex parte Robinson*, 19 Wall. 505, 510, this Court observed:

The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed with this power. * * *

The justification for this "inherent" power is obvious. Courts are in the business of adjudicating disputes, and they must, in an orderly society, possess the power to effectuate their judgments and impose them, where necessary, upon unwilling parties. Compliance with court orders which are likely to be disobeyed may, of course, be compelled in either of two ways:

(1) The execution of a sanction such as fine or imprisonment may be conditioned by the court upon compliance with the court order. This is the traditional form of civil contempt, which has been recognized as constitutionally permissible pursuant to summary procedures even by those members of the Court who have expressed the view that criminal contempt

must constitutionally be tried to a jury. See, *e.g.*, *United States v. United Mine Workers*, 330 U.S. 258, 330-332 (Black and Douglas, JJ.); *Green v. United States*, 356 U.S. 165, 197-198 (The Chief Justice, Black, Douglas, JJ., dissenting); *United States v. Barnett*, 376 U.S. 681, 727-728, n. 6 (Black and Douglas, JJ., dissenting), 753-754 (The Chief Justice, Douglas, Goldberg, JJ., dissenting).

(2) The threat of an indefinite future sanction, such as fine or imprisonment, as punishment for disobedience may be invoked as a means of compelling present compliance with a court order. This latter course, which amounts to criminal contempt, relies, of course, on the kind of deterrence customary in the criminal law—*i.e.*, those subject to the duty imposed by the law are warned that disobedience, if there is any, will be punished after it occurs.

Both civil and criminal contempt share the common objective of compelling obedience to a court order. In civil contempt the actual sanction is presently imposed to prevent a violation; in criminal contempt the *threat* of a sanction is the contemplated deterrent and the sanction itself is merely the realization of the threat. As of the time the imprisonment or fine is executed there is a difference between civil and criminal contempt—the former is then prospective (it looks to future compliance) while the latter is retrospective (it rests upon past disobedience). As this Court observed in *Penfield Co. v. Securities and Exchange Commission*, 330 U.S. 585, 594: "When the court imposes a fine as a penalty, it is punishing yesterday's contemptuous conduct. When it adds the coer-

cive sanction of imprisonment, it is announcing the consequences of tomorrow's contumacious conduct." But in terms of the complete process viewed as of the time of the entry of the original court order, civil and criminal contempt are nothing more than alternative methods of deterring disobedience.⁶ The execution of the latter sanction occurs, of course, after the order has been violated, in order to demonstrate to others that the threat is not an empty one. But it is an integral part of the coercive machinery which courts must have at their disposal to obtain compliance with their orders.

Court orders are clearly different in this regard from legislative mandates. There is no "inherent" power to coerce obedience to statutory directives. The legislature, which expresses the majority's will in a statute, may authorize violators of the legislative command to be imprisoned or fined *after* they commit their violations. But there is no power with respect to legislative judgments analogous to civil contempt—i.e., to "the power of courts to impose conditional imprisonment for the purpose of compelling a person to obey a valid order." *Green v. United States*, 356 U.S. 165, 197 (Black, J., dissenting). An indi-

⁶ We can see, for example, no practical difference between the conditional imposition of a fine such as that sustained as civil contempt by this Court in *United States v. United Mine Workers*, 330 U.S. 258, and a warning that a fine will be imposed as a criminal penalty if the order is disobeyed. The purpose of both is to coerce compliance, and the need to implement the threatened sanction is no greater in the former case than in the latter. Cf. Note, *Procedures for Trying Contempts in the Federal Courts*, 73 Harv. L. Rev. 353, 355-356 (1959).

vidual who has failed to file income-tax returns in past years may not, for example, be imprisoned until he files a current return. That is true, we submit, because under our legal system there is not as immediate an interest in obtaining compliance with legislative commands as there is in coercing obedience to the more specific directives which arise out of the formal adjudication of a particularized controversy. Consequently, criminal prosecution after the commission of an offense of those violating a statute is deemed an adequate deterrent for other potential lawbreakers. In the case of court orders, on the other hand, the specific public or private rights which are protected require more certain enforcement than the usual criminal remedy can provide.

As this Court has pointed out, in many instances "Contempts are neither wholly civil nor altogether criminal." *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441, and "particular acts do not always readily lead themselves to classification as civil or criminal contempts," *McCrone v. United States*, 307 U.S. 61, 64. Where a person refuses to perform an act which he has been ordered to do, it may be possible to imprison him until he complies with the order. If, on the other hand, he has done an act which he has been forbidden to do, compliance may no longer be possible and the harm may already have been done. Civil contempt then has no function to serve and only punishment is appropriate. See *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418; *United States v. United Mine Workers*, 330 U.S. 258; *Penfield Co. v. Securities and Exchange Commission*,

330 U.S. 585; Note, *Civil and Criminal Contempt in the Federal Courts*, 57 Yale L. J. 83, 90-95; Rapalje, *Contempts* § 21 (1884). The punishment is not merely retributive, however. It serves as a deterrent to others and prevents future violations. The knowledge that swift punishment will follow deliberate disobedience is obviously an effective deterrent.

This is particularly significant because not every court order lends itself to enforcement by civil contempt. Recognizing, as this Court long ago observed, that in compelling obedience to their decrees courts must exercise "the least possible power adequate to the end proposed" (*Anderson v. Dunn*, 6 Wheat. 204, 231; *In re Michael*, 326 U.S. 224, 227), we agree that if it is practical to obtain compliance in a manner whereby defendants "carry the keys of their prison in their own pockets" (*In re Nevitt*, 117 Fed. 448, 461), it might be an abuse of discretion for a court to invoke the more stringent remedy of criminal contempt. But that does not, in our view, mean that if civil contempt is an inadequate or impractical method of securing compliance with a particular court order, the threat of punishment for disobedience—which is the real goad to compliance—may be implemented only in the manner prescribed for violations of legislative mandates.

The impracticality of relying upon civil contempt in certain instances is demonstrated by the cases now before the Court. See pp. 35-37, *infra*, and our brief in *Cheff v. Schnackenberg*, No. 67, this Term, pp. 11-19; see also our brief in *Harris v. United States*, No. 6, this Term, pp. 21-23. A simple hypo-

thetical can demonstrate the imbalance which would be introduced into the law if this Court were to hold that criminal contempt is subject to the procedural safeguards prescribed by the Constitution for the trial of violations of legislative enactments. If, in an action between adjoining landowners over two trees growing on one party's property near their common boundary, a court were to conclude that one tree constituted a nuisance and should be removed by its owner but that the owner was entitled to undisturbed enjoyment of the other, it could enforce its decree against the owner—if he did not voluntarily comply with the order to remove one tree—by imprisoning him until he had the tree removed. With respect to the neighbor's obligation not to interfere with enjoyment of the other tree, the court would be unable to compel compliance by the sanction of civil contempt. The only effective remedy would be the threat of imprisonment in case of disobedience, and implementation of that threat would constitute criminal contempt.⁷ It is obvious that the order would be substantially less effective against the neighbor than against the owner. It would, we submit, be consistent with the rule that the court should exercise

⁷ Conditioning a term of imprisonment on disobedience—i.e., announcing in advance that each contempt will be punished by a definite term of imprisonment—would not, in our view, change the nature of the proceeding from criminal to civil contempt. If imprisonment is imposed *after* disobedience, even if it has, under a prior order of the court, been conditioned on disobedience, it constitutes punishment. See *Clay v. Waters*, 178 Fed. 385 (C.A. 8); *Abrams v. United States*, 64 F. 2d 22, 23 (C.A. 2); *United States v. Rosen*, 174 F. 2d 187 (C.A. 2), certiorari denied, 338 U.S. 851.

only "the least possible power adequate to the end proposed" (*Anderson v. Dunn*, 6 Wheat. 204, 231) if the criminal contempt sanction applicable to the neighbor were made as speedy, certain and effective as the civil contempt sanction available with respect to the owner. That is patently not the result if criminal contempt is treated no differently from violation of a criminal statute.

The difference between sanctions to be imposed for violations of legislative enactments and for violations of court orders was recognized by the Judiciary Act of 1789, 1 Stat. 73. This circumstance is of obvious importance in the interpretation of Constitutional guarantees since the Act was drawn by men who had lived through the adoption of the Constitution and considered the objections thereto. The power to punish for contempt is set forth in the Judiciary Act, which created the federal courts, and not in the Crimes Act of 1790, 1 Stat. 112, which defined federal crimes. In Sections 9, 11 and 12 of the Judiciary Act, Congress gave the district and circuit courts jurisdiction over crimes and civil actions and provided that trial of issues of fact in these actions shall be by jury. Jurisdiction over contempts was not covered by these sections but was treated separately in Section 17, which provided that the courts shall have power to punish "by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same * * *." 1 Stat. 83. The draftsmen of the federal statute, like those responsible for colonial and State legislation, obviously did not treat contempt as a "crime." They considered a

court's authority to punish for contempt to be a distinct power, quite separate and apart from ordinary criminal jurisdiction. Moreover, the draftsmen of these federal statutes not only treated contempt as different from "crimes" but they combined criminal and civil contempt in one authorizing provision. Cf. *Penfield Co. v. Securities and Exchange Commission*, 330 U.S. 585, 594. See also *Nelson v. Steiner*, 279 F. 2d 944 (C.A. 7); *National Labor Relations Board v. Deena Artware*, 261 F. 2d 503 (C.A. 6), reversed on other grounds, 361 U.S. 398. This, we believe, shows that the framers considered a court's authority with respect to all forms of contempt to be a distinct power, separate and apart from its ordinary criminal jurisdiction.

United States v. Hudson, 7 Cranch 31, decided in 1812, reinforces this conclusion. The Court there rejected the suggestion that federal courts were empowered to punish common-law crimes. Mr. Justice Johnson distinguished, in that case, between ordinary criminal jurisdiction—as to which "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence" (7 Cranch at 33-34)—and the "implied powers [which] must necessarily result to our courts of justice, from the nature of their institution" (*ibid.*), such as the power to punish for contempt. We submit that in providing for trial by jury of all "crimes" or in all "criminal prosecutions" in Article III and the Sixth Amendment, the Constitutional draftsmen had in mind only the former class—*i.e.*, crimes created by "the legislative authority." They were not intending to encroach on the

"implied powers" of courts of justice to deal appropriately with those who disobeyed court orders.

This conclusion is further reinforced by the fact that, although a court's contempt jurisdiction is personal, enabling courts to punish for contempts wherever they are committed (*e.g.*, *Blackmer v. United States*, 284 U.S. 421, 438-440), Article III provides that trials for "Crimes" "shall be held in the State where the said Crimes shall have been committed," and the Sixth Amendment provides that juries in "criminal prosecutions" be "of the State and district wherein the said crime shall have been committed." Such coupling of jury-trial provisions with territorial limitations appropriate in "criminal prosecutions" but inappropriate in proceedings for contempt, demonstrates the purpose of the drafters that Article III and the Sixth Amendment not apply to contempt proceedings.

B. THE FUNCTION OF A FACT-FINDER IN CRIMINAL CONTEMPT PROCEEDINGS CHARACTERISTICALLY DIFFERS FROM THAT IN ORDINARY CRIMINAL PROSECUTIONS

Criminal contempt is also different from ordinary criminal prosecutions for statutory violations because the alleged contemnor has customarily been through an extensive legal and factual inquiry in which he has had the opportunity to refine the issues, present his position to the court and determine the precise nature of his legal obligation. As these cases and *Cheff* demonstrate (pp. 39-41, *infra*; *Cheff* brief, pp. 12, 16-17), a contempt action for willful disobedience of an order of a court does not normally arise until the scope

and terms of the order have been fixed in prior proceedings in which the defendant has had the benefit of counsel. The defendant therefore can be said to have had counsel available even as he committed the acts constituting criminal contempt. In many instances (including the willful refusal to testify involved in these cases), the disobedience of the order represents a continued refusal to abide by the legal adjudications made before the order was issued. In ordinary criminal prosecutions on the other hand, the underlying legal and factual issues have not been refined and litigated in a judicial proceeding (or an administrative one, as in *Cheff*) as they have been in a contempt proceeding. In the usual criminal case, the defendant has not had counsel present while the scope of his legal duty was being determined. Nor has the conduct required of him by law been sharply and specifically defined with reference to his individual case.

A criminal statute operates *in terrorem*. It imposes a duty and fixes punishment in terms of general applicability. An individual is subject to the criminal law even though a court has not instructed him personally that he should not perform a particular act under particular circumstances. His duty is to conduct himself in a manner consistent with the generalized command of the statute.

In this respect, jury trial serves a distinct purpose in the context of criminal prosecutions which it does not do in contempt proceedings. The jury, reflecting a consensus of the community, determines whether the generalized command of the legislature ought to apply in the particular circumstances of a defendant's case

(assuming, of course, that as a matter of statutory construction, the conduct comes within the reach of the statute). In other words, it is the function of the jury not merely to decide the facts but also to apply the law—as the trial judge explains it—to the facts. In contempt proceedings, on the other hand, the underlying court order, fixed after an adversary proceeding, imposes the particularized legal duty on a specific defendant. That stage is accompanied by the customary safeguards consistent with due process of law, including representation of the defendant by counsel of his choosing.

A defendant cannot be found guilty of contempt unless he knows or should know that a court order governing his conduct has issued. See *Pettibone v. United States*, 148 U.S. 197, 206–207. He does not risk punishment for inadvertent violations because he, unlike a potential criminal defendant, may obtain definitive clarification of an order from the authority which has issued it. See *Regal Knitwear Co. v. National Labor Relations Board*, 324 U.S. 9, 15. In short, the protections provided during the stages which necessarily precede any contempt action generally leave nothing to be resolved except, perhaps, whether the defendant has violated the terms of the order.*

This ultimate issue of fact might, to be sure, be left to a jury for decision. But we submit that such a determination differs in kind from that which a jury is called upon to make in the ordinary criminal pros-

* Where the contempt consists of a refusal to testify, as it does in these cases, even that factual issue is not presented. See p. 39, *infra*.

ecution, where it not only decides the facts but reflects the community's view as to whether the generalized criminal statute ought to apply to the particular facts presented. See Note, *Procedures for Trying Contempts in the Federal Courts*, 73 Harv. L. Rev. 353, 365-366 (1959). This difference renders it less probable that the Constitutional draftsmen intended to include contempt within the meaning of "crimes" or "criminal prosecutions." Moreover, there are many instances, such as those illustrated by the present cases, in which there are no real issues of fact in the contempt proceeding. The jury's only purpose then might be to nullify the underlying court order—a function which, for reasons set out at pp. 30-33, *infra*, we believe not to be properly within the jury's province with respect to court orders. Finally, the greater interest of society in coercing compliance with court orders than with legislative commands (pp. 20-21, *supra*), which warrants imprisonment for civil contempt when a judge determines, without a jury's intervention, that a defendant is failing to comply, warrants a similar fact-finding by a judge in instances when civil contempt is an inadequate means of compelling obedience.

C. A JURY SHOULD NOT HAVE THE SAME POWER TO "NULLIFY" A COURT ORDER AS IT HAS WITH RESPECT TO CRIMINAL STATUTES

One of the protections afforded by the constitutional guarantee of jury trial in criminal prosecutions is, in the view of some commentators, the power of the jury to acquit a defendant notwithstanding undisputed and conclusive proof of guilt. See, e.g., Curtis, *The Trial Judge and the Jury*, 5 Vand. L.

Rev. 150, 157-166 (1952); Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. Chi. L. Rev. 386, 411-413 (1954); cf. Devlin, *Trial by Jury* (1956), pp. 87-91. Compare *Sparf and Hansen v. United States*, 156 U.S. 51; *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 408. Where, as in these cases, there is no disputed issue of fact, the only purpose of submitting the case to a jury would be for such possible "nullification." And in situations where issues of fact are presented, the possibility that, notwithstanding the evidence, a jury will acquit a popular defendant or frustrate enforcement of an unpopular order reduces the likelihood of compliance. However appropriate this power may be with respect to legislative enactments, we submit that it would be inconsistent with a rule of law to permit similar nullification of court orders.

In a legal system such as ours, nullification of court orders by a jury has a much more damaging effect on the rule of law than does similar nullification of statutes. A statute is essentially an expression of the majority's will as manifested by its elected representatives. It may be appropriate, therefore, that when a cross-section of the community such as a petit jury believes the law to be harsh or inapplicable to particular facts, it demonstrates the popular consensus by returning an acquittal. The administration of justice is, under this view, kept current with community thinking; by reflecting "popular prejudice" the jury "keep[s] the administration of the law in accord with the wishes and feelings of the community." Holmes, *Law in Science*

and Science in Law, 12 Harv. L. Rev. 443, 460 (1899). Since criminal punishment should be imposed only for conduct deemed reprehensible by the community, the jury acts as a check on the enforcement of obsolete or unjust laws.

Court orders, however, should not be the products of "the wishes and feelings of the community." They result from the determination of private rights and may vindicate unpopular plaintiffs or enforce legal obligations which are disagreeable to the community. Where the order is injunctive, it may well reflect a determination that a vital right is threatened by imminent and irreparable injury. It is obviously of great importance to the functioning of a legal system that orders affecting private rights issued after due adjudication be obeyed even if a majority of the community is out of sympathy with the result of the litigation or with the prevailing party. Private litigation is not a matter of popular consensus, and the rule of law requires that the effectiveness of a court order implementing a private right not depend on whether it pleases a popular majority. But if trial by jury is held to be constitutionally necessary in criminal contempt cases, there is no assurance that unpopular court orders which cannot be enforced by civil contempt will be enforceable at all. As this Court observed in *In re Debs*, 158 U.S. 564, 595: "To submit the question of disobedience to another tribunal, be it a jury or another court, would operate to deprive the proceeding of half its efficiency."

In addition, respect for the rule of law is more likely to be impaired if court orders, which represent

particularized adjudications of legal disputes, are nullified than if more general legislative enactments are disregarded. The end product of a legal system is the judgment in a particular dispute, and if such an adjudication may be disregarded with impunity by the individual upon whom the legal system has specifically imposed a duty, potential litigants will have no confidence in the system.

Moreover, the constitutional guarantee of trial by jury, when applicable, includes the requirement that the verdict be unanimous. *Marwell v. Dow*, 176 U.S. 581, 586; *Andres v. United States*, 333 U.S. 740. Thus, if a jury trial were required in order to punish disobedience of a judicial writ or decree, a single juror lacking in sympathy with the underlying order could render it ineffective. Such a result would undermine the independence of the federal courts, which the Constitution sought to protect against the will of temporary popular majorities by providing life tenure for federal judges and prohibiting the diminution of judicial compensation.

These dangers are not nearly as grave with regard to legislation. The nullification of a criminal statute in one, or even in several, cases will undoubtedly reduce its effectiveness, but the law nonetheless remains on the statute books and may be enforced in other situations. Nullification of a court order by a jury's acquittal of a contemnor, on the other hand, can effectively wipe out the entire adjudication and deprive the prevailing party of the legal right sustained by the court.

Nor can a distinction be drawn between orders enforcing private rights and those resulting from cases in which a governmental agency is the prevailing party. If criminal contempt constitutes a "crime" for purposes of the constitutional right to jury trial in one instance, it is similarly a "crime" in the other. Moreover, suits by public agencies often protect what are, essentially, private rights. Even where the government is nominally a party, the underlying right may be a private one, so that nullification of a court order by a jury could abrogate a judicially sustained constitutional or legal right. See, *e.g.*, *United States v. Barnett*, 376 U.S. 681.

II

JURY TRIAL IS INAPPROPRIATE IN A CRIMINAL CONTEMPT PROCEEDING BASED ON A WITNESS' REFUSAL TO TESTIFY

A. THE DUTY OF A WITNESS TO TESTIFY IS ESSENTIAL TO THE EFFECTIVE FUNCTIONING OF COURTS

In our system of jurisprudence the fact-finding function of the courts is dependent upon the attendance of witnesses. The duties and importance of the witness to the administration of justice were described by this Court in *United States v. Bryan*, 339 U.S. 323, 331 as follows:

On the other hand, persons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of the legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds,

in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty, which every person within the jurisdiction of the Government is bound to perform when properly summoned. See, e.g., *Blair v. United States*, 250 U.S. 273, 281 (1919); *Blackmer v. United States*, 284 U.S. 421, 438 (1932).

This principle is fundamental to our system in both criminal and civil suits. Indeed, the power to summon witnesses is one of the safeguards granted to criminal defendants by the Sixth Amendment along with jury trial and the right to counsel. The accused in a criminal case has the right "to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor." This safeguard, like compulsory process generally, has traditionally been enforced through the contempt power. This Court has said that "a doubt has never been uttered that stubborn disobedience of the duty to answer relevant inquiries in a judicial proceeding brings into force the power of the federal courts to punish for contempt." *Brown v. United States*, 356 U.S. 148, 153-154. See also *Lamb v. Schmitt*, 285 U.S. 222, 226. Rule 17(g) of the Federal Rules of Criminal Procedure specifically provides that failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of court.

In view of this basic fact, it necessarily follows

that in a judicial system such as ours, which depends on the testimony of witnesses, the courts must have power to compel testimony. The need for this power, particularly in relation to testimony, is inherent in the ability of a court to function as such.

Testimony before a grand jury is no different, in this respect, than testimony in open court. This Court observed in *Levine v. United States*, 362 U.S. 610, 617, that "[t]he grand jury is an arm of the court and its *in camera* proceedings constitute 'a judicial inquiry.'" See also *Brown v. United States*, 359 U.S. 41, 49; *Cobbledick v. United States*, 309 U.S. 323, 327. The court must, therefore, have the power to compel the testimony of witnesses who wrongfully refuse to testify.

B. CIVIL CONTEMPT IS NOT AN ADEQUATE MEANS OF COMPELLING
WITNESS TO TESTIFY

There is, we think, no serious disagreement with the position we have stated above—that the courts must have some inherent power to take action against a witness who wilfully refuses to give testimony. The dispute lies in whether the commitment of the witness summarily without a jury must be limited to "civil" contempt—conditional "confinement to compel future performance"—or otherwise be treated as an ordinary crime and be made triable by jury. See the dissenting opinions in *Sacher v. United States*, 343 U.S. 1, 22; *Green v. United States*, 356 U.S. 165, 197-198; *United States v. Barnett*, 376 U.S. 681, 727-728, n. 6, 753-754. It is said that the conditional nature of civil contempt makes tolerable the omission of

many of the procedural safeguards with which criminal proceedings are hedged. *Uphaus v. Wyman*, 364 U.S. 388, 403-404 (Douglas, J., dissenting).

Civil contempt is often, however, an inadequate remedy for the contumacious refusal of a witness to testify or to obey a subpoena to produce records. It may not be "power adequate to the end proposed." *Anderson v. Dunn*, 6 Wheat. 204, 231. The main purpose of imprisoning a recalcitrant witness may be to compel him to testify—a civil purpose. Fortuitous circumstances, however, such as the length of the trial or the short duration of the grand jury investigation may make imprisonment for the duration of the proceeding wholly insufficient as a coercive measure. See *Jurney v. MacCracken*, 294 U.S. 125, 151. A witness who wishes to aid or injure a party by withholding testimony may well feel emboldened to disregard his duty to testify if he knows that the only coercive sanction which can be immediately imposed is imprisonment for the duration of a short trial. Similarly, with respect to a grand jury, it is not realistic to have the effectiveness of the compulsion depend on how close to the expiration of the grand jury's term the witness happens to be called.

Moreover, the punitive and coercive aspects of contempt cannot realistically be fragmented in the case of a witness' refusal to testify. The power to compel compliance may well depend on making clear to the witness that immediate imprisonment of some duration will result from non-compliance, even if the proceeding has terminated. There is no sharp distinction between civil and criminal contempt in such a situation.

Since the available remedy of civil contempt (which may involve imprisonment of a grand jury witness for as long as eighteen months) may be imposed without a jury trial, it would be anomalous to require a jury trial where, because of the circumstances, the sentence must be cast in criminal form.*

These considerations, we submit, also dispose of the claim made by Shillitani that the "admixture of civil and criminal contempt" in the sentence invalidated the judgment of conviction. The judge provided that the imprisonment imposed would be terminated if Shillitani answered the question before the expiration of the grand jury's term. This clause, far from being prejudicial to his interest, gave petitioner an opportunity to reduce his prison term if he decided to purge himself of contempt. To the extent that the sentence was conditional, it was not

*In *Pappadio*, the court sentenced petitioner to imprisonment for two years "or until further order of this Court, should [petitioner] answer before the Grand Jury the questions * * * and should [petitioner] answer those questions before the expiration of said sentence or the discharge of said Grand Jury, whichever may first occur, the further order of this Court may be made terminating and modifying the sentence of imprisonment" (P.R. 217-218). In *Shillitani*, the court of appeals construed similar language to mean that the contemnor had an unqualified right to be released if he obeyed the order of the district court. The trial judge thus gave petitioners a *locus penitentiae* between the time of the contempt and the end of the life of the grand jury. The terms of the sentence imposed on petitioners made it clear that the principal purpose of the sentence was to compel petitioners to testify and not to punish them for their past disobedience. Petitioners "car[ried] the keys of their prison in their own pockets" (*In re Nevitt*, 117 Fed. 448, 461), until the end of the life of the grand jury, just as if they had been found in civil contempt.

essentially different from that in which a defendant is placed on probation if he abides by certain conditions. In tax evasion cases, for example, courts have conditioned probation upon payment of all taxes and penalties lawfully due. See, *e.g.*, *United States v. Taylor*, 305 F. 2d 183 (C.A. 4), certiorari denied, 371 U.S. 894. The court said in *Shillitani* that the purpose of the sentence "is not intended so much by way of punishment as it is intended solely to secure for the grand jury answers to the questions that have been asked of you" (2 S.R. 61). The punishment was thereby fashioned to fit the purpose for which punishment is imposed. While making clear the seriousness with which the court regarded the contumacious refusal, it gave petitioner a further opportunity to comply with the order. This was, we submit, not merely permissible but actually desirable. Compare the dissenting opinion in *Brown v. United States*, 359 U.S. 41, 56, commenting upon the lack of a purge clause. By attaching this condition to the sentence, the court was making certain that the sanction being exercised was "the least possible power adequate to the end proposed." *Anderson v. Dunn*, 6 Wheat. 204, 231.

Moreover, the sentence here—unlike that in *Reina v. United States*, 364 U.S. 507—cannot be construed as "a present adjudication of guilt for a crime to be committed in the future." 364 U.S. at 515 (Black, J., dissenting). The district judge followed the procedures prescribed by Rule 42(b) and he distinctly imposed punishment for petitioner's earlier

failure to testify. The fact that he added a condition favorable to petitioner should not be a ground for invalidating the judgment.

C. IT IS PARTICULARLY CLEAR THAT A JURY WOULD SERVE NO USEFUL FUNCTION IN A CONTEMPT CASE INVOLVING THE REFUSAL OF A WITNESS TO TESTIFY

It would be particularly inappropriate to reconsider the long line of decisions, culminating with *Barnett*, in a case involving witnesses' refusal to testify; the jury has no real function to serve in such cases. The primary duty of a jury is to resolve issues of fact. *Patton v. United States*, 281 U.S. 276, 312. There are normally no issues of fact where a witness refuses to testify, and this is true whether the refusal occurs in the presence of the court or, as in this case, before the grand jury. These cases aptly illustrate that proposition. Petitioners refused to testify before grand juries consisting of at least sixteen persons. Their refusals were recorded by official court reporters. It was, therefore, undisputed that they had refused to answer questions before the grand jury after being directed to do so by the court.

Nor can there be any genuine issue of wilfulness (except possibly in the case of refusal to appear). That issue would turn on whether the witness knew he was ordered to answer and intended not to obey the order. His motive for refusing is irrelevant, and he need not know that he is breaking the law. *Townsend v. United States*, 95 F. 2d 352, 358 (C.A.D.C., certiorari denied, 303 U.S. 664; *Fields v.*

United States, 164 F. 2d 97 (C.A.D.C.), certiorari denied, 332 U.S. 851.¹⁰

The genuine issues which may exist in such situations are issues of law, such as the possible scope of immunity and the pertinency of the questions. These issues are ordinarily presented and argued before the order is issued, and, in any event, they are issues which a court, rather than a jury, should determine. *Sinclair v. United States*, 279 U.S. 263, 298; see, also, *United States v. Williams*, 341 U.S. 58. The witness who refuses to testify has had the assistance of counsel on these issues not only after he is charged with contempt but before, and even while, his contempt is being committed. This circumstance tends to point up the fact that we are not here dealing with a "crime" in the normal sense in which the word is used. The fact that the action taken is one which in almost every case occurs after full opportunity to consult with counsel and after counsel has had an opportunity to present to the court all legal contentions regarding the order of the court distinguishes this type of contempt from even the rare criminal cases, such as refusal to report for military induction and contempt of Congress, in which there are no genuine issues of fact. In the criminal cases, the order which was disobeyed first comes before a court for judicial scrutiny in the criminal prosecution.

¹⁰ Frightened silence, which this Court referred to in *Harris v. United States*, 382 U.S. 162, is relevant only in mitigation of sentence—an area which is entirely within the province of the sentencing judge. See *Piemonte v. United States*, 367 U.S. 556, 559.

But where a witness disobeys a court order to testify, there has been an opportunity for all legal and factual considerations regarding the order to be presented to the court before its issuance. Refusal to answer is, we submit, different from a "crime" in the usual sense. It is what courts have always considered contempt to be—*sui generis*.¹¹

D. JURY TRIAL SHOULD NOT DEPEND ON WHETHER THE WITNESS' REFUSAL OCCURRED IN THE COURT'S PRESENCE

Petitioner Pappadio argues (Br. 18-25) that the distinction discussed by this Court in *Harris v. United States*, 382 U.S. 162, between contempts in the presence of the court and contempts committed outside its presence should be applied to the right to a jury trial. But that distinction, which existed at common law and is reflected in the different procedures set forth in Rule 42(a) and (b) of the Federal Rules of Criminal Procedure, has never been held to apply to any question other than whether summary procedures may be used to pun-

¹¹ Our argument that petitioners were not entitled to a jury trial also answers the issue raised in *Shillitani* (No. 412) that he had a constitutional right to an indictment. As this Court said in rejecting this contention in *Green v. United States*, 356 U.S. 165, 184-185:

"* * * It would indeed be anomalous to conclude that contempts subject to sentences of imprisonment for over one year are 'infamous crimes' under the Fifth Amendment although they are neither 'crimes' nor 'criminal prosecutions' for the purpose of jury trial within the meaning of Art. III, § 2, and the Sixth Amendment."

It is significant that even where Congress has provided for jury trials in contempt cases (see 18 U.S.C. 3692) it has not thought it necessary to require grand jury indictment.

ish the contempt. If the contempt is committed in the presence of the court, the court has power to act immediately, without notice and hearing. Where the contempt is committed outside the presence of the court, the court must provide notice and hearing. It has never been suggested that the requirement of more deliberate procedures rendered the latter form of contempt a "crime" or "criminal prosecution" for purposes of the constitutional right to a jury trial. The *Harris* case held only that the contempt committed there could be punished under Rule 42(b) and not, by causing it to be repeated in open court, under Rule 42(a).

E. THIS COURT SHOULD NOT EXERCISE ITS SUPERVISORY POWER TO SET A FIXED LIMIT UPON CONTEMPT SENTENCES OR TO REQUIRE JURY TRIALS FOR CERTAIN KINDS OF CONTEMPT

Petitioner Pappadio also argues that, regardless of constitutional authority, this Court should impose a six-month limitation on punishment without a jury trial or require jury trials for contempts committed outside the presence of the court in the exercise of its supervisory power over the federal courts. The supervisory power, however, has heretofore been exercised only where standards for official action are established by the Constitution, by statute or by rule, and where no sanction is explicitly provided in case of their violation. In effect, courts thereby carry out a constitutional or statutory mandate. See *On Lee v. United States*, 343 U.S. 747, 754-756. Compare *McNabb v. United States*, 318 U.S. 332; *Ballard v. United States*, 329 U.S. 187; *Elkins v. United States*, 364 U.S. 206. That is not true of the present case.

Nor, we submit, is there any reason to impose either of petitioner's limitations on the law of contempt since the existing standard of reasonableness, which governs the imposition of sentences for criminal contempt, is an adequate safeguard. In the first Judiciary Act Congress gave to the courts power to punish "by fine or imprisonment at the discretion of said courts, all contempts of authority in any cause or hearing before the same." That Congress, implementing a Constitution which was designed to last through changing conditions, apparently recognized that contempts of court can be so varied that no definite penalty can appropriately be fixed.¹² As a result, the statutory authority to punish for contempt by fine or imprisonment has remained unchanged since 1789 despite changed conditions, including the growth of administrative agencies which often rely on the courts' contempt power in various stages of their operations. There is no reason now to limit, by a Court-imposed rule, this flexible power which has served the courts for a century and a half.

Moreover, there is a safeguard against the possibility of misuse of the contempt power in that, unlike the situation in criminal prosecutions, sentences for contempt are subject to appellate review. See, *e.g.*, *Green v. United States*, 356 U.S. 165, 187-188; *United States v. United Mine Workers*, 330 U.S. 258. There is thus no reason to fear that excessive uncorrectible

¹² Many contempts, to be sure, are relatively minor. Others, however, are grave. One of the Justices described the contempt alleged in the *Barnett* case as "extraordinarily serious, among the most serious in this Nation's history" (376 U.S. at 758).

punishments will be imposed by district courts; the exercise of discretion may be carefully policed by courts of appeals and by this Court. If, as petitioner asserts, district judges have been imposing "more and more severe penalties" (Pappadio Br. 23) in recent years, the remedy lies with reviewing courts and with this Court. Juries do not determine sentences, and affording the right to trial by jury in contempt cases would not reduce the incidence of alleged "severe penalties."

III

PETITIONER PAPPADIO'S SENTENCE WAS REASONABLE

The grand jury in this case was investigating an organized conspiracy to import narcotics into the United States and had information that Thomas Lucchese was head of a group of people engaged in this activity and in other illegal enterprises (P.R. 106, 112). The investigation covered the wholesale distribution of narcotics in the New York area (P.R. 106, 112-133). Petitioner Pappadio was granted immunity under the Narcotic Control Act of 1956 and was questioned about Lucchese. After first refusing to answer questions, Pappadio admitted that he knew Lucchese but denied he knew anyone who dealt with narcotics. He also testified that since the service of the grand jury subpoena he and Lucchese had met with lawyers. He refused, however, to give the names of the persons who were present at these meetings or to relate where these meetings took place. The grand jury legitimately sought to discover the names of those peoples who were interested in Pappadio's grand jury testi-

mony. It was entitled to know whether others suspected of narcotics offenses were interested in Pappadio's testimony and whether his refusal to testify despite a grant of immunity was related to the refusal of other witnesses who did the same.¹³

The reasonableness of Pappadio's sentence cannot, we believe, be measured simply by balancing the number of questions he answered against those he refused to answer. The questions must be appraised in context in order to determine the seriousness of his contumacious behavior. This was primarily a task for the trial judge. It was appropriate for him to consider how substantial a sentence was necessary in order to obtain compliance with the order to testify. In an investigation involving a far-ranging narcotics conspiracy, such as this one apparently was, a substantial sentence was obviously needed to coerce significant testimony from a reluctant witness.¹⁴ This

¹³ In the same investigation, other witnesses, including Shillitani, similarly refused to testify. See *United States v. Castaldi*, 338 F. 2d 883 (C.A. 2); *United States v. Tramunti*, 343 F. 2d 548 (C.A. 2).

¹⁴ Petitioner's alleged fear of a perjury indictment is in essence a reargument of an issue which this court declined to review when it limited its grant of certiorari. If the possibility of conflict between statements under oath in the course of the proceeding would be sufficient to raise the danger of self-incrimination of perjury which petitioner asserts, a witness in any civil or criminal proceeding could invoke the same claim after having given several answers under oath. A witness could, for example, under this theory, refuse to answer questions on cross-examination on the claim that those answers might be used against him on a perjury prosecution for testimony given during his direct examination. This is not, we submit, the sort of real hazard against which the privilege is designed to protect. Cf. *Hoffman v. United States*, 341 U.S. 479, 486-487.

Court has held that the trial court, in imposing sentence for a criminal contempt, "may properly take into consideration the extent of the willful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future. Because of the nature of these standards, great reliance must be placed upon the discretion of the trial judge." *United States v. United Mine Workers*, 330 U.S. 258, 303. Judge Medina, in dissent below, believed that the two-year sentence was "too much" (P.R. 226). That is a question which this Court must, of course, resolve on its own evaluation of the record in light of the standards announced in the *United Mine Workers* case, *supra*. Without suggesting that Judge Medina's conclusion was unreasonable, we call to the Court's attention the great importance of the grand jury's inquiry and the fact that petitioner persisted in his refusal despite repeated and specific instructions.¹⁵ In light of these circumstances and the obvious desirability of obtaining compliance from other similar witnesses, we think the district court's judgment was a supportable one.

¹⁵ For a chronology of the proceedings leading to the adjudication of contempt, see P.R. 72-74.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of the court of appeals should be affirmed.

RALPH S. SPRITZER,*
Acting Solicitor General.

FRED M. VINSON, Jr.,
Assistant Attorney General.

NATHAN LEWIN,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

FEBRUARY 1966.

*In lieu of the Solicitor General who has disqualified himself.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 442.

ANDIMO PAPPADIO,

Petitioner,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF.

1. Adamantly the Government insists that a prison term of two years is a reasonable sentence to be imposed on this petitioner. The Government's essential argument is nothing more than a baseless assertion that "we think the district court's judgment was a supportable one" (U. S. Brief, p. 46).

Earlier this Term, the Government purported to take a quite different position. Its brief in *Harris v. United States*, No. 6 this Term, bravely asserted (p. 65) that:

"In the contempt area, therefore, there is no reason to fear that excessive uncorrectible punishments will be imposed by district courts; the exercise of discretion may be carefully policed by courts of appeals and by this Court."

The Government's present brief shows that the "careful policing" is to consist of a superficial exercise in

sophistry. If the Government really believed that this Court can and should carefully police contempt sentences to correct excessive punishment, it would deal with the facts in the record relevant to sentence and not present to this Court baseless surmises of what might have been in the mind of the district court.

The Government's argument that this extraordinary sentence was reasonable wholly disregards the only facts that this Court has before it. Not a word is said about petitioner's age, occupation, and personal circumstances, cited on page 32 of Petitioner's Brief. The Government ignores the significance of petitioner's slight criminal record, a conviction as a juvenile which has been expunged by Presidential pardon. Nothing in petitioner's background is mentioned that could conceivably explain the harsh sentence that was imposed.

The Government does begin to discuss the nature of the offense; the introduction sounds promising. "The questions must be appraised in context in order to determine the seriousness of his contumacious behavior" (U. S. Brief, p. 45). The Government then proceeds to pass over the entire context of petitioner's refusal to answer.

Most startling of the Government's omissions is its total silence on the fact that, when petitioner refused to testify, there was a pending indictment in which he was charged with violation of the narcotics laws. Pendency of that indictment was central to the refusal of petitioner to answer the few questions. Until the prosecutor's questions turned to petitioner's relationship with his lawyers, he had been a truly cooperative witness, answering over one hundred and twenty-five questions. He refused to answer a few

questions only when he believed that interrogation into his relations with counsel and witnesses threatened to prejudice the posture of his defense against the indictment. Counsel for the petitioner expressly advised the district court that if that indictment were dismissed, "it certainly would influence the defendant in answering some of these particular questions" (R. 42a). In light of the importance that this indictment played in the petitioner's conduct and the events in the district court, it is beyond comprehension that the Government would argue to this Court the reasonableness of the sentence without any reference to the indictment and its consequences.

Actually the Government does not totally overlook the indictment against petitioner. In an obscure footnote in its statement of facts, the Government informs this Court that "the indictment against petitioner was recently dismissed" (U. S. Brief, p. 7, note 3). The Government might have been more explicit had they advised this Court that the indictment was dismissed in January 1966, after petitioner's brief had been filed in this case.

The Government's argument that a two-year sentence is reasonable also fails to mention other serious and well grounded legal bases for petitioner's few refusals to answer. Thus, petitioner offered a plausible challenge to those questions as not demonstrably pertinent to the announced subject of the Grand Jury investigation. He questioned the use of an immunity statute of limited scope should the Grand Jury seek freely to enlarge or change the subject under inquiry. Neither of these is given heed by the Government.

Strangely, in view of the Government's silence on petitioner's most basic legal objections to the few ques-

tions he refused to answer, the Government does refer to one objection, petitioner's fear of being whipsawed into a perjury prosecution. Here, however, silence would have been preferable. For the second time in this Court, the Government grossly misstates petitioner's argument. The Government's distorted version is that petitioner merely feared that he might contradict himself under oath and thus commit perjury (U. S. Brief, p. 45, note 14). The Government brushes aside the fact that, by the prosecutor's own assertion, he had sworn testimony implicating petitioner as a member of an illicit narcotics group. Petitioner flatly denied the truth of that charge under oath. This set the contradiction petitioner might reasonably fear could lead to a perjury prosecution, the contradiction between his statement and the sworn testimony said to be in the possession of the Government. (See Petitioner's Brief, pp. 30-31.)

In this Court, petitioner raised these various legal objections to the questions, not to establish their validity, but only to demonstrate that his refusals to answer a few questions were not a brazen refusal to cooperate. The existence of serious and unresolved legal doubts is highly relevant to the degree of petitioner's contumaciousness. Therefore, it is relevant to the immediate question of the reasonableness of the very harsh sentence imposed by the district court. On this argument, the Government is in total default.

While the Government pays no attention to the context of petitioner's refusals to answer as revealed in the record, it seeks to introduce other "background" facts for which there is no record support whatsoever. The Government is not above argument by invective, styling petitioner a "reluctant witness" from whom

testimony must be coerced (U. S. Brief, p. 45). The record shows the contrary, that petitioner was a fully cooperative witness who answered all questions until the prosecutor turned to the meetings with counsel. The Government tries by its own *ipse dixit* to establish that petitioner was withholding "significant testimony" in an investigation "involving a far-ranging narcotics conspiracy." (*Ibid.*)

The few questions that petitioner refused to answer cannot be described as dealing with "significant testimony" about any such conspiracy, real or imagined.

Petitioner formally refused to answer only five questions. In his main brief (p. 10), it was noted that petitioner had in fact answered the fourth question. (See R. 211a and R. 178a.) Petitioner had also answered the second question. (See R. 210a and R. 186a-187a.) The second question is substantially identical with the fifth question. In sum, petitioner effectively failed to answer only two questions: "Mr. Papadiao, who were the attorneys who were present at these meetings?" and "Who else was present at these meetings besides yourself, Lucchese and the attorneys?" These two questions, or even the five, hardly suggest "significant testimony" about a far-ranging narcotics conspiracy.

The two-year sentence cannot be upheld as a sentence for a narcotics offense. Stripped of that coloration, the sentence is patently excessive. Here a basically cooperative witness refused to answer a few questions. His reasons for refusal are not untenable, certainly not unreasonable. If two years is appropriate in such a case, what will the Government propose for a case of wilfully contumacious behavior? What of the wit-

ness who simply refuses to answer any questions? Petitioner has already endured substantial imprisonment. He has been put to the great expense of appeals through two appellate courts. This is more than enough punishment for his negligible misbehavior. His sentence ought to be reduced to no more than the time served.

2. The Government's Brief devotes itself mainly to an effort to prevent the recognition of a right to jury trial in criminal contempt cases. A few comments on that effort may be noted. First, the Government does not even try to argue that history supports a denial of jury trial on contempts not committed in the presence of the court. The elaborate study of colonial practice offered by the Government in the *Harris* case does not separate contempts in the courtroom, where speedy punishment may be necessary in order to vindicate the court's dignity and authority, from other contempts. The historical materials seem to show only that there was no colonial practice of jury trials in the former. This Court in *Harris* recognized that such contempts are properly dealt with summarily and without the intervention of a jury trial.

Second, the Government is led to a bizarre image of the role of jury trial in criminal prosecutions. According to the Government, the function of the jury is to nullify legislative commands, a situation that the Government finds not merely tolerable, but desirable. The Government so premises in order to contrast the undesirable situation if juries, i.e., instruments of nullification, are allowed to prevent the enforcement of judicial commands. For the Government seriously

to argue in this Court that nullification of either legislative or judicial mandates is the sole, or even an important, function of the jury is surely a measure of desperation. The jury is a proven instrument of justice, superior in many respects to professional judges. This does not make the jury an adversary of the judge. Nor does it make the jury an adversary of the legislature. The Government's argument rests upon a false premise and a meaningless contrast.

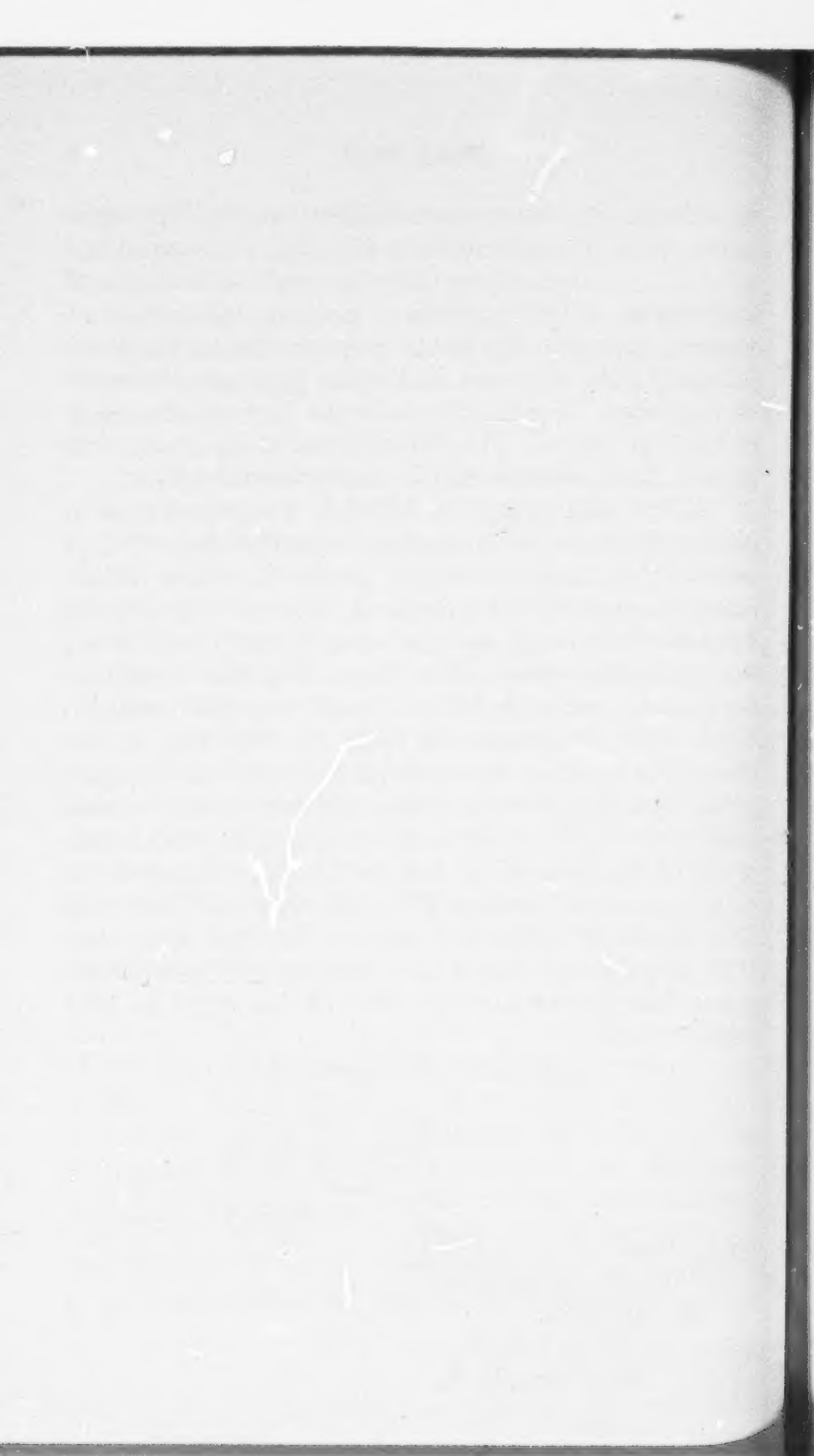
Third, this Court has failed in the recent past to declare a constitutional right to jury trial in contempt cases, other than contempts in the presence of the court, because of the weight of history. Mr. Justice Frankfurter recognized that "scholarship has shown that historical assumptions regarding the procedure for punishment of contempt of court were ill-founded". *Green v. United States*, 356 U. S. 165, 189 (1958). The Court was not then persuaded to correct a century and a half of legislative and judicial history based on such assumptions. Two years ago, this Court faced a similar error of long-standing, but forthrightly rejected the cases that rested on that rule. *Murphy v. Waterfront Commission of New York Harbor*, 378 U. S. 52 (1964). It is equally imperative that this Court throw off the error that prevents recognition of the right to jury trial.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce St.,
Philadelphia, Pa. 19107
Counsel for Petitioner.

Of Counsel:

LAURITANO, SCHLACTER
& SCHNEIDER,
205 West 34th St.,
New York, N. Y.



SUPREME COURT OF THE UNITED STATES

Nos. 412 AND 442.—OCTOBER TERM, 1965.

Salvatore Shillitani, Petitioner,

412 v.

United States of America.

Andimo Pappadio, Petitioner,

442 v.

United States of America.

On Writs of Certiorari
to the United States
Court of Appeals for
the Second Circuit.

[June 6, 1966.]

MR. JUSTICE CLARK delivered the opinion of the Court.

These consolidated cases again present the difficult question whether a charge of contempt against a witness for refusal to answer questions before a grand jury requires an indictment and jury trial. In both cases, contempt proceedings were instituted after petitioners had refused to testify under immunity granted by the respective District Courts. Neither petitioner was indicted or given a jury trial. Both were found guilty and sentenced to two years imprisonment, with the proviso that if they answered the questions before then, they would be released. The opinion of the District Court in *Pappadio* is reported at 235 F. Supp. 887 (D. C. S. D. N. Y. 1964). In *Shillitani*, the District Court simply entered an order, which is not reported. The Court of Appeals for the Second Circuit affirmed each conviction in separate opinions. *Pappadio v. United States*, 346 F. 2d 5 (1965); *Shillitani v. United States*, 345 F. 2d 290 (1965). We granted certiorari to review the validity of the sentences imposed in both cases. 382 U. S. 913, 916 (1965). We hold that the conditional nature of these sentences renders each of the actions a civil contempt proceeding, for which indictment and jury trial

2 SHILLITANI v. UNITED STATES.

are not constitutionally required. However, since the term of the grand jury before which petitioners were contemptuous has expired, the judgments below must be vacated and the cases remanded for dismissal.

I.

No. 412, *Shillitani v. United States*.

Shillitani appeared under subpoena before a grand jury investigating possible violations of the federal narcotics laws. On three occasions he refused to answer questions, invoking his privilege against self-incrimination. At the Government's request, the District Judge then granted him immunity under the Narcotics Control Act of 1956, 18 U. S. C. § 1406 (1964 ed.), and ordered him to answer certain questions. When called before the grand jury again, Shillitani persisted in his refusal. Thereafter, in a proceeding under Rule 42 (b) of the Federal Rules of Criminal Procedure,¹ the District Court found him guilty of criminal contempt. No jury

¹ This rule provides:

"Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

trial was requested. Shillitani was sentenced to prison for two years "or until the further order of this Court. Should . . . Mr. Shillitani answer those questions before the expiration of said sentence, or the discharge of the said grand jury, whichever may first occur, the further order of this Court may be made terminating the sentence of imprisonment." The Court of Appeals affirmed, rejecting Shillitani's constitutional objection to the imposition of a two-year sentence without indictment or trial by jury on the basis that "the contempt proceedings preceded any compliance" and the "sentence contained a purge clause." It further construed the sentence as giving Shillitani an unqualified right to be released if and when he obeyed the order to testify. 345 F. 2d, at 294.

No. 442, *Pappadio v. United States*.

Pappadio appeared under subpoena before the same grand jury. He also refused three times to answer numerous questions on the ground that the answers would incriminate him. He was then granted immunity under 18 U. S. C. § 1406 and directed to testify. He continued to refuse to answer any questions except those of identification. In opposition to the grand jury's subsequent request that the District Court require Pappadio to cooperate, his attorney claimed that he should not be called as a witness so long as a 1958 indictment charging him with conspiracy to violate the narcotics laws was pending. The District Court held that Pappadio had complete immunity, including any criminal proceeding then pending, and ordered him to answer all questions previously asked. Upon return to the grand jury, Pappadio did respond to numerous questions, but still refused to answer five questions pertaining to his alleged association with a group headed by Thomas Lucchese which engaged in narcotics traffic and other

illicit activities.² An order to show cause was issued, Pappadio's demand for a jury was denied, and the District Court found him in contempt for willful disobedience of its order to testify. He received a sentence almost identical to that given Shillitani, and the Court of Appeals affirmed on the same grounds.³

II.

We believe that the character and purpose of these actions clearly render them civil rather than criminal contempt proceedings. See *Penfield Co. v. Securities & Exchange Comm'n*, 330 U. S. 585, 590 (1947). As the distinction was phrased in *Gompers v. Bucks Store & Range Co.*, 221 U. S. 418, 449 (1911), the act of disobedience consisted solely "in refusing to do what had been ordered," i. e., to answer the questions, not "in doing what had been prohibited." And the judgments imposed conditional imprisonment for the obvious purpose of compelling the witnesses to obey the orders to testify. When the petitioners carry "the keys of their prison in their own pockets," *In re Nevitt*, 117 F. 448, 461 (C. A. 8th Cir. 1902), the action "is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance

² These questions were as follows:

"Mr. Pappadio, who are the attorneys who were present at these meetings?

"Aside from the meetings which you described, which took place in the street, where else did you meet with Lucchese?

"Who else was present at these meetings besides yourself, Lucchese and the attorneys?

"All right; How many of such meetings were there?

"Where did the meetings take place?"

³ Because of the similarity in language between the two contempt orders, it is reasonable to assume that the Court of Appeals also construed Pappadio's sentence as giving him an absolute right to be released upon compliance, although the opinion was silent on this point.

with judicial decrees." *Green v. United States*, 356 U. S. 165, 197 (1958) (BLACK, J., dissenting). In short, if the petitioners had chosen to obey the order they would not have faced jail. This is evident from the statement of the District Judge at the time he sentenced Shillitani:

"I want to make it clear that the sentence of the Court is not intended so much by way of punishment as it is intended *solely* to secure for the grand jury answers to the questions that have been asked of you." (Emphasis supplied.)

The Court of Appeals also interpreted the sentence as conditional: "We construe the judgment in this case . . . to mean that defendant has an unqualified right to be released from prison once he obeys Judge Wyatt's order. As thus construed, the sentence was entirely proper." 345 F. 2d, at 294. While all of the parties before this Court briefed the issues with reference to criminal contempt, counsel for petitioners and the Government conceded at argument that the contempt orders were remedial, and, therefore, might well be deemed civil in nature rather than criminal.⁴

⁴ The record of the contempt proceedings in Pappadio's case further indicates that the District Judge viewed the matter as civil contempt. The following colloquy offers one example:

"Mr. Lawler: Your Honor, since the primary purpose of this investigation is to obtain testimony or to obtain evidence so that indictments might be filed or voted upon, might I suggest . . . that you include a clause in the sentence that if Mr. Pappadio does answer the questions as directed, that a further application may be made to your Honor to reconsider this sentence, so that we will have some coercive effect on Mr. Pappadio.

"The Court: Yes, I shall adopt the proposal presented by Assistant United States Attorney Lawler, and my decision shall be deemed to include a provision reading in the form and manner proposed"

The Assistant United States Attorney again stressed the coercive function of the sentences when opposing applications for bail pending appeal by both Shillitani and Pappadio.

The fact that both the District Court and the Court of Appeals called petitioners' conduct "criminal contempt" does not disturb our conclusion. Courts often speak in terms of criminal contempt and punishment for remedial purposes. See, *e. g.*, *United States v. Onan*, 190 F. 2d 1 (C. A. 8th Cir. 1951). "It is not the fact of punishment but rather its character and purpose that often serve to distinguish" civil from criminal contempt. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 441 (1911). Despite the fact that Shillitani and Pappadio were ordered imprisoned for a definite period, their sentences were clearly intended to operate in a prospective manner—to coerce, rather than punish. As such, they relate to civil contempt. While any imprisonment, of course, has punitive and deterrent effects, it must be viewed as remedial if the court conditions release upon the contemnor's willingness to testify. See *Nye v. United States*, 313 U. S. 33, 42-43 (1941). The test may be stated as: what does the court primarily seek to accomplish by imposing sentence? Here the purpose was to obtain answers to the questions for the grand jury.³

III.

There can be no question that courts have inherent power to enforce compliance with their lawful orders through civil contempt. *United States v. United Mine Workers*, 330 U. S. 258, 330-332 (1947) (BLACK and DOUGLAS, JJ., concurring in part and dissenting in part); *United States v. Barnett*, 376 U. S. 681, 753-754 (1964) (Goldberg, J., dissenting). And it is essential that courts be able to compel the appearance and testimony of witnesses. *United States v. Bryan*, 339 U. S. 323, 331

³ On the contrary, a criminal contempt proceeding would be characterized by the imposition of an unconditional sentence for punishment or deterrence. See *Cheff v. Schnackenberg*, *post*, at —.

(1950). A grand jury subpoena must command the same respect. Cf. *Levine v. United States*, 362 U. S. 610, 617 (1960). Where contempt consists of a refusal to obey a court order to testify at any stage in judicial proceedings, the witness may be confined until compliance. *McCrone v. United States*, 307 U. S. 61 (1939); *Giancana v. United States*, 352 F. 2d 921 (C. A. 7th Cir.), cert. denied, 382 U. S. 959 (1965).⁶ The conditional nature of the imprisonment—based entirely upon the contemnor's continued defiance—justifies holding civil contempt proceedings absent the safeguards of indictment and jury, *Uphaus v. Wyman*, 364 U. S. 388, 403-404 (1960) (DOUGLAS, J., dissenting), provided that the usual due process requirements are met.⁷

However, the justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order. *Maggio v. Zeitz*, 333 U. S. 56, 76 (1948). Where the grand jury has been finally discharged, a contumacious witness can no longer be confined since he then has no further opportunity to purge himself of contempt. Accordingly, the contempt orders entered against Shillitani and Pappadio were improper insofar they imposed sentences that extended beyond the cessation of the grand jury's inquiry into petitioners' activities.⁸ Having sought to deal only with civil contempt, the District Courts

⁶ The court may also impose a determinate sentence which includes a purge clause. This type of sentence would benefit an incorrigible witness. It raises none of the problems surrounding a judicial command that unless the witness testifies within a specified time he will be imprisoned for a term of years. See *Reina v. United States*, 364 U. S. 507 (1960).

⁷ See *Parker v. United States*, 153 F. 2d 66, 70 (C. A. 1st Cir. 1946).

⁸ By the same token, the sentences of imprisonment may be continued or reimposed if the witnesses adhere to their refusal to testify before a successor grand jury.

lacked authority to imprison petitioners for a period longer than the term of the grand jury. This limitation accords with the doctrine that a court must exercise "the least possible power adequate to the end proposed." *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821); *In re Michael*, 326 U. S. 224, 227 (1945).^o The objection that the length of imprisonment thus depends upon fortuitous circumstances, such as the life of the grand jury and when a witness appears, has no relevance to the present situation. That argument would apply only to unconditional imprisonment for punitive purposes, which involves different considerations. Once the grand jury ceases to function, the rationale for civil contempt vanishes, and the contemnor has to be released. Since the term of the grand jury in these cases expired in March 1965, the judgments here for review are vacated, and the cases remanded with directions that they be dismissed.

It is so ordered.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE WHITE took no part in the decision of these cases.

^o This doctrine further requires that the trial judge first consider the feasibility of coercing testimony through the imposition of civil contempt. The judge should resort to criminal sanctions only after he determines, for good reason, that the civil remedy would be inappropriate.